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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 439

W. A. BELCHER, NELL VANDERGRIFT BELCHER, JAMES R. ABERNATHY, JR., and MARY BELCHER ABERNATHY,
Petitioners,

vs.

GEORGE D. PATTERSON, DISTRICT DIRECTOR OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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INDEX

Opinions of the Courts Below 2

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 4

Statement of the Case 5

(a) Preliminary Procedural Statement 5

(b) Statement of Facts and Theory of Trial in the District Court 7

Reasons for Granting the Writ of Certiorari 24

I. The Decision of the Court of Appeals Reversing the Judgment of the District Court Entered upon the Jury Verdict on Special Interrogatories Responsive to the Charge of the District Court Given in Defendant's Requested Instruction No. 4 Violates the Provisions of the Seventh Amendment of the Constitution Limiting the Scope of Review of Jury Verdicts in Courts of the United States in Suits at Common Law 24

II. The Court of Appeals Denied Petitioners the Right of Trial by Jury Guaranteed by the Seventh Amendment by the Final Adjudication on Appeal As a Separate Issue the Factual Question of Whether Timber Was Held by the Partnership Primarily for Sale to Customers in the Ordinary Course of the Trade or Business of the Partnership Without Providing That Such Issue Be Initially Presented for Determination of a Jury Subject to Review Prescribed in the Seventh Amendment 36

III. Whether Property Sold to a Single Vendee Constitutes Property Held Primarily for Sale to Customers in the Ordinary Course of the Trade

or Business of Taxpayer Is a Factual Issue for the Determination of the Trier of Fact, Subject to Review under the Clearly Erroneous Rule, and the Contrary Decision of the Court of Appeals Is in Conflict with the Decision of the 9th Circuit Court of Appeals in *Jantzer* v. *Commissioner*, 9th Cir., 1960, 284 F.2d 348 42

Conclusion 46

TABLE OF CASES

Ah Pah Redwood Co. v. *Commissioner*, 9th Cir., 1957, 251 F.2d 163 27, 38

Atlantic and Gulf Stevedores v. *Ellerman Lines, Ltd.*, U.S. , 82 S. Ct. , 7 L. Ed. 798 25, 26, 36

Baltimore & Carolina Line v. *Redman*, 295 U.S. 654, 55 S. Ct. 890, 79 L. Ed. 1636 25-26, 41, 42

Beacon Theatres, Inc. v. *Westover*, 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. 988 25, 26

Camp Mfg. Co. v. *Commissioner*, 3 T.C. 467 43, 44, 46

Dairy Queen, Inc., v. *Wood*, U.S. , 82 S. Ct. , 8 L. Ed. 2d 44 25, 26

Dimick v. *Schiedt*, 293 U.S. 474, 55 S. Ct. 296, 79 L. Ed. 603, 95 A.L.R. 1150 25

Estate of M. M. Stark v. *Commissioner*, 45 BTA 882 43, 46

Gasoline Products Co. v. *Champlin Ref. Co.*, 283 U.S. 494, 51 S. Ct. 513, 75 L. Ed. 1188 26

Gianfala v. *Texas Company*, 350 U.S. 879, 76 S. Ct. 141, 100 L. Ed. 775 25, 29, 44

Jantzer v. *Commissioner*, 9th Cir., 1960, 284 F.2d 348 42, 44

Jantzer v. *Commissioner*, 32 T.C. 161 43, 44, 46

Kentucky-West Virginia Gas Co. v. *Lafferty*, 6th Cir., 1949, 174 F.2d 848 28

Mach v. *Abbott Co.*, 8th Cir., 1943, 136 F.2d 7, cert. den. 320 U.S. 773 28

Matheson v. *U. S.*, 227 U.S. 540, 33 S. Ct. 355, 57 L. Ed. 631 28

Parsons v. *Bedford*, 3 Pet. 433, 7 L. Ed. 732 37, 42

Isaacs Peebles v. *Commissioner*, 5 T.C. 14 ..... 43, 44, 46
Sage v. *United States*, 250 U.S. 33, 39 S. Ct. 415, 63 L. Ed. 828 24
Slocum v. *New York Life Insurance Company*, 228 U.S. 364, 33 S. Ct. 523, 57 L. Ed. 879 ..... 41, 42
Smietanka v. *Indiana Steel Company*, 257 U.S. 1, 42 S. Ct. 1, 66 L. Ed. 99 24
The Texas Company v. *Gianfala*, 5th Cir., 1955, 222 F.2d 382 44
Virginia Railroad Co. v. *Mullens*, 271 U.S. 220, 46 S. Ct. 526, 70 L. Ed. 915 28
Walker v. *New Mexico & S. P. R. Co.*, 165 U.S. 593, 17 S. Ct. 421, 41 L. Ed. 837 26

CONSTITUTIONAL PROVISION, STATUTES AND OTHER AUTHORITIES

Seventh Amendment, Constitution of the United States 4, 24, 25, 30, 34, 36

Internal Revenue Code of 1939—

Sec. 117 (26 U.S.C.A. 1952 Ed. Sec. 117) 4, 26, 39, 43, 44

Internal Revenue Code of 1954—

Sec. 1221 (26 U.S.C.A. Sec. 1221) 5, 26, 39, 43
Sec. 631 (26 U.S.C.A. Sec. 631) 39
3 American Jurisprudence, Appeal and Error, Sec. 830, p. 372 28
Rule 16, Federal Rules of Civil Procedure 31

INDEX TO APPENDIX

(Bound Separately)

United States District Court for the Northern District of Alabama—

Pre-Trial Order 2
Jury Verdict on Special Interrogatories 6
Findings of Fact, Conclusions of Law and Order 12
Judgments 22
United States Court of Appeals for the Fifth Circuit—
First Opinion 29
Judgment 47
Extended Opinion on Petition for Rehearing 49
Order Denying Petition for Rehearing 52
Order Staying Issuance of Mandate 53

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Petitioners,

vs.

GEORGE D. PATTERSON, DISTRICT DIRECTOR OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, William Albert Belcher, Nell Vandergrift Belcher, James R. Abernathy, Jr., and Mary Belcher Abernathy, respectfully pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Fifth Circuit entered on April 19, 1962, reversing the judgment of the United States District Court

for the Northern District of Alabama, on the appeal docketed in said Court of Appeals as Number 18,925, and the order of said Court of Appeals denying rehearing entered on June 29th, 1962.

OPINIONS OF COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 302 F.2d 289 (Appendix, p. 29). The extended opinion of the Court of Appeals for the Fifth Circuit denying the petition for rehearing has not been reported to date (Appendix, p. 49). The District Court did not file an opinion, but the order for computation of refund pursuant to jury verdicts on special interrogatories, findings of fact and conclusions of law, together with the judgments entered thereon are set forth in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on April 19, 1962 (Appendix, p. 47). The order denying the petition for rehearing was entered on June 29, 1962 (Appendix, p. 52). The jurisdiction of this Court is invoked under Title 28, U.S.C.A., §1254(1).

QUESTIONS PRESENTED

1. Where the court charged the jury in a Federal income tax refund suit at the written request of respondent District Director, in affirmative defense of the determination of the Commissioner of Internal Revenue, of the amounts of timber sales entitled to long term capital gain treatment, as follows:

"Defendant's Requested Instruction No. 4

* * *

"You will notice from the questions I am going to hand you to take into the jury room that you are asked to determine the fair market value of timber held for six months or less, and for timber held for more than six months. *The separation is important because the tax treatment is different. Timber held for more than six months is subject to the capital gains tax while timber held for six months or less before the cutting date is subject to ordinary income tax rates.* Therefore, your answers will separate the two for each of the years in question."

was not the jury verdict on special interrogatories determining the amount of such timber held over six months responsive to the "law of the case" as stated in such instruction, an adjudication of the amount of timber qualifying for long term capital gain treatment, thereby precluding any re-examination by the Court of Appeals of such finding of the jury, other than according to the rules of the common law, as prescribed in the Seventh Amendment of the Constitution of the United States.

2. Were not petitioners denied the right to jury trial guaranteed by the Seventh Amendment by the final adjudication on appeal as a separate issue by the Court of Appeals of the question of whether timber was held by the partnership primarily for sale to customers in the ordinary course of the trade or business of the partnership without providing that such separate issue be initially presented for determination by a jury subject to review as limited in the Seventh Amendment.

3. Where property is sold to a single vendee, is it not a factual question for the trier of fact to determine whether such property is held primarily for sale to customers in the ordinary course of the trade or business of the taxpayer

under §117(a) and §1221(1) of the Internal Revenue Code of 1939 and 1954, respectively?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Seventh Amendment of the Constitution of the United States

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Internal Revenue Code of 1939:

Sec. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—(1) [as amended by Sec. 210(a), Revenue Act of 1950, c. 994, 64 Stat. 906] *Capital assets.*—The term 'capital assets' means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(A) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business; * * *

(4) [As amended by Sec. 150(a) (1), Revenue Act of 1942, c. 619, 56 Stat. 798 and Sec. 322 (c) (2) Revenue Act of 1951, c. 521, 65 Stat. 452] *Long-term capital gain.*—The term 'long term capital gain' means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing gross income;

(Secs. 1221(1), 1222(3), [26 U.S.C. 1958 Ed., Secs. 1221, 1222] are the corresponding provisions of the 1954 Code, and in all pertinent respects the same.)

STATEMENT OF THE CASE

(a) Preliminary Procedural Statement

Seven Federal income tax refund suits involving the years 1950-1955, except 1953, instituted against the respondent District Director of Internal Revenue by petitioners, who were individual partners of Belcher Land and Timber Company, a partnership (hereinafter referred to as the partnership), and W. A. Belcher Lumber Company, Inc., a corporation, (hereinafter referred to as the corporation), were consolidated for trial in the United States District Court for the Northern District of Alabama. These civil actions arose under the Federal internal revenue laws relating to income taxes upon which the jurisdiction of the District Court was based. The individual partners in those cases are petitioners. There was no appeal from the judgment in the case involving the corporation (R. 169, *et seq.*). A jury trial was demanded for the trial of all of the cases and all of the issues made by the pleadings in the cases were formulated by the District Court with the consent of the parties in a pre-trial order for submission to the jury upon special interrogatories (R. 160, See Appendix). At the trial, by agreement, the issues relating to the tax consequences of timber sales and realty sales were submitted to the jury under the special interrogatories formulated in the pre-trial order, while all of the other issues as formulated in the pre-trial order were decided by the court (R. 299, 530). The jury verdict on special interrogatories relating to the timber sales and realty sales was entered on September 30, 1960 (R. 546). Subsequently, on October

10, 1960, the court made findings of fact and conclusions of law which were incorporated in one document with the jury verdict on special interrogatories, and an order that the parties should compute the amount of refund for entry of final judgments. The findings of fact and conclusions of law entered subsequently to the jury verdict included findings consistent with the jury verdict as to capital gains on timber sales (R. 575). The final judgments for refund were subsequently entered in each of the cases (R. 586, *et seq.*). The respondent District Director appealed in each of the cases involving individual partners of the partnership to the United States Court of Appeals for the Fifth Circuit* (R. 595).

The fundamental question involved in this petition for certiorari is whether the decision of the Court of Appeals denying any capital gain treatment of timber sales constitutes a violation of the Seventh Amendment by reversing the judgment based upon the jury verdict on special interrogatories determining the amount of such capital gains.

The position of petitioners is that the capital gain treatment of timber issue for the years 1950, 1951, 1952 and 1955 was conclusively adjudicated favorably to petitioners in the District Court by the jury verdict on special interrogatories under the "law of the case" as given in the charge of the court to the jury at respondent District Director's written request as contained in Defendant's Requested Instruction No. 4. (For the year 1954 the Commissioner's determination of long term capital gain on timber sales being uncontested must necessarily

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*The individual partners involved also appealed from the jury verdict on special interrogatories for the years 1954 and 1955 involving the tax consequences of the sales of realty by the partnership.

stand. The Court of Appeals failed to note that no issue was made by the pleadings with respect to long term capital gains of timber sold by the partnership to the corporation for the year 1954. There was no motion for new trial, and no motion for judgment n.o.v.

The Court of Appeals in its first opinion proceeded from the erroneous premise that the finding of facts and conclusions of law of the District Court were entered prior to submission of the case to the jury and that "the *subsequent* interrogatories submitted to the jury distinguishing long term capital gains from short term gains *necessarily followed.*" In the petition for hearing, petitioners pointed out that the case was submitted to the jury and the jury verdict on special interrogatories was rendered ten days before the entry of the findings of fact and conclusions of law by the District Court. In the extended opinion on the petition for rehearing, the Court of Appeals acknowledged the error in the first opinion by admitting that the jury verdict preceded the findings of fact and conclusions of law subsequently entered by the Court; but, nonetheless, adhered to the result of the first opinion on the theory that the jury verdict with respect to timber sales of timber held over six months, lacked "efficacy" until the entry of findings consistent therewith by the District Court which the Court of Appeals held to be erroneous.

(b) Statement of Facts and Theory of Trial in the District Court

In the years from 1950 to 1955, the partnership held land in several Alabama counties, principally devoted to growing timber. The partnership and the corporation had been formed in 1946 as successors to a former partnership known as W. A. Belcher Lumber Company, which

had been dissolved in 1946. The interests in the old and new partnership, and the stock in the corporation, were owned by members of the Belcher family in the following proportions:

W. A. Belcher,	34%
Nell V. Belcher	34%
Nell Vandergrift Belcher, as trustee for:	32%
Mary Earnestine Belcher Abernathy	
William Albert Belcher, Jr.	
Van Elam Belcher	
Katherine Anne Belcher	
	100%

(R. 65, 154, 456; Pl. Ex. 48, R. 874*)

At the time of the dissolution of the old partnership, the assets and liabilities were divided between the successor entities—the corporation and the new partnership. Generally, the so-called operating assets of the dissolved partnership such as the lumber mill, rolling stock and equipment were transferred to the new corporation, while the investment type assets, consisting mainly of timberlands, were held by the new partnership (Pl. Ex. 49, R. 877, 878).

The partnership owned in fee over 50,000 acres of timberlands and the partnership also leased timberlands from other owners from time to time (R. 233). The only sales of timber involved in the refund suits are the sales of standing timber made by the partnership to the cor-

*The pages of the record containing exhibits are not numbered by the printer, but for convenience page numbers are referred to herein as if same had been numbered in consecutive numerical order in continuation of actual numbering of preceding pages.

poration* which cut the timber, in the dollar aggregate of about $2,000,000.00 for the years involved in this litigation (R. Deft. Ex. 2, R. 975, *et seq.* R. 546, *et seq.*). The first opinion of the Court of Appeals emphasized the testimony of W. A. Belcher that sales were made of standing timber by the partnership to the corporation. Unless a "sale or exchange" were involved no question of capital gain would, of course, arise.

The timber sold by the partnership to the corporation was cut off of both so-called fee lands and leased lands of the partnership. The annual board footage of all timber sold by the partnership to the corporation, including timber held over six months and timber held less than six months, varied from a low of about 12 million board feet to a high of about 16.5 million board feet for the years in question.

The Commissioner of Internal Revenue determined that the partnership was entitled to long term capital gain treatment of all timber held over six months sold by the partnership to the corporation whether the timber was cut from fee or leased lands and the respondent District Director affirmatively defended the determination of the Commissioner.

Petitioners differed with the Commissioner's determination as to the amount of such long term capital gains. A comparison of the respective amounts is as follows:

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*While not material because no question involving "outside sales" was presented during the entire period, the dollar volume of sales to other purchasers than the corporation (outside sales) was only .00104% of the total, and through 1954 the percent was about half of that minuscule figure.

COMPARISON LONG TERM GAINS ON SALE OF TIMBER

1950	
Revenue Agent's Report * * *	$288,481.06
Belcher Land and Timber Co. Sales to W. A. B. Lbr. Co., Inc.	$324,636.81
1951	
Revenue Agent's Report * * *	$321,886.39
Belcher Land and Timber Co. Sales to W. A. B. Lbr. Co., Inc.	$508,226.96
1952	
Revenue Agent's Report * * *	$322,099.74
Belcher Land and Timber Co. Sales to W. A. B. Lbr. Co., Inc.	$475,648.29
1954	
Revenue Agent's Report * * * (The Commissioner's determination was accepted without contest by the petitioners)	$146,717.52
1955	
Revenue Agent's Report * * *	$264,698.94
Belcher Land and Timber Co. Sales to W. A. B. Lbr. Co., Inc.	$161,960.59

(Deft. Ex. 2, R. 975; Pl. Ex. 34, R. 830)

The issue litigated in the trial court as to long term capital gain treatment of timber stemmed from the attack upon the Commissioner's determination of the *amount* of such long term capital gains made in the complaints filed by the petitioners against the respondent, District Director of Internal Revenue. *There was no issue made in the pleadings as to whether petitioners were entitled to long term capital gains on timber held over six months sold by*

the partnership to the corporation. The only problem was to determine the amount of such gains. This issue as to the amount of such gains resulted from the pleadings*.

*For example, the allegations of the complaint for the year 1950 read as follows:

YEAR 1950—EXTRACT COMPLAINT—COUNT ONE.

"5. * * *

"(b) A further erroneous adjustment was made in said RAR 6/24/59 for the year 1950 by reducing the aggregate gain on the sale of timber by said Belcher Land and Timber Company partnership by $28,704.98 and redistributing such gain between long and short term sales as follows:

Furthermore, the amount of $28,704.98 constitutes a reduction of sales price and gain on disposition of timber for the taxable year ended December 31, 1950, computed as follows:

	Sales Price As Per Return	Sales Price As Determined Herein Per Exhibit G	Increase (or Decrease) In Gain
Timber held for more than six months			
Sales to W. A. Belcher Lumber Co., Inc.:			
Leased land acquired prior to 1947		$ 69,105.43	
Leased lands held for more than six months		41,119.80	
Fee lands held for more than six months		176,107.38	
Outside sales		2,148.45	
Total long-term capital gains	$326,785.26	$288,481.06	($38,304.20)
Timber held for six months or less:			
Sales to W. A. Belcher Lumber Co., Inc.:			

On September 22, 1960, one day before the commencement of the trial of the consolidated cases, respondent District Director filed a motion for setoff wherein it was stated in part as follows:

Leased lands held for six months or less	44,795.46	54,394.68	9,599.22
	$371,580.72	$342,874.74	($28,704.98)

Sections 22, 24, 25 and 115 of the Internal Revenue Code of 1939."

"Plaintiffs deny that there is any reduction of gain to be redistributed as between long term and short term gain of said partnership, both for the reason that the sales price of timber sold by the partnership to said corporation was not in excess of the fair market value thereof and also for the reason that no dividend was received by said partnership from said corporation. Plaintiff further avers that the aggregate long term capital gains from the sale of timber held for more than six months was correctly stated in the tax return of Belcher Land and Timber Company to be in the amount of, to-wit, $326,785.26, and that the timber sales of timber held for six months or less were also correctly stated in such return to be in the amount of, to-wit, $44,795.46, and that the adjustments made therein by RAR 6/24/59 were incorrect both in amount and in ratio." (R. 4, 5; Deft's Ex. 2, R. 975, 989).

The answer of the respondent, District Director, reads as follows:

YEAR 1950—EXTRACT ANSWER.

"5. * * *

"(b) Denies the allegations contained in paragraph 5 (b) of Count One, except admits that the adjustments mentioned there was made and the RAR 6/24/59 speaks for itself. *Denies that such adjustments was erroneous.* Defendant admits that the aggregate long term capital gains from sale of timber held more than six months was stated in the tax return of Belcher Land and Timber Company to be in the amount of $326,785.26, and that the sales of timber held for six months or less were

"IV

"The agents of the Internal Revenue Service incorrectly assumed that the sales of timber and logs constituted gain from the sale of a capital asset held for more than six months under the provisions of Sections 117(k)(2) of the Internal Revenue Code of 1939, or 631(b) of the Internal Revenue Code of 1954." (R. 165, 167)*.

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stated in such return to be in the amount of $44,795.46." (Emphasis supplied) (R. 146).

For other years, see Complaint C.A. 9529, R. 11 and 12, Answer 148; Complaint C.A. 9640, R. 67, 68, 80, 81, 82; Answer 154, 158.

*(The complete Motion for Set-Off reads as follows:

"* * *

DEFENDANT'S MOTION FOR SET-OFF.

"Comes now the defendant, George D. Patterson, by and through his attorney, William L. Longshore, and moves this Court to grant a set-off against whatever recovery the plaintiffs in these cases may receive for the following described reasons:

I.

"Belcher Land and Timber Company is a partnership existing under the laws of the State of Alabama. The partners of this Company, during the years 1950-1955, incusive, are the plaintiffs in these consolidated cases.

II.

"During the years 1950-1954, inclusive, the Belcher Land and Timber Company, was engaged among other things, in the business of selling logs and timber to customers in the ordinary course of its trade or business.

III.

"In the years 1950-1955, the partnership reported the following income from sales of logs and timber, which it claimed was entitled to long term capital gains treatment under either

The motion for setoff did not purport to raise any question as to the applicability of section 117(a) of the 1939 Code or section 1221(1) of the 1954 Code, nor any question as to whether timber sold by the partnership to the corporation constituted "property held primarily for sale to customers in the ordinary course of the trade or business of the taxpayer". In the first opinion of the Court of Appeals, an attempt was made to construe the motion as if it contained the quoted language but that language was not in the motion during the litigation in the trial court, and hence not considered as being there by the trial court. The complete statement of issues in the pre-trial order was never changed or modified and the case was tried in the District Court on the issues as stated in the pre-trial order. The mo-

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Section 117(k)(2) of the Internal Revenue Code of 1939, or Section 631(b) of the Internal Revenue Code of 1954.

1950	$205,392.78
1951	163,808.78
1952	211,801.11
1954	53,004.95
1955	43,157.09

IV.

"The agents of the Internal Revenue Service incorrectly assumed that the sales of timber and logs constituted gain from the sale of a capital asset held for more than six months, under the provisions of Sections 117(k)(2) of the Internal Revenue Code of 1939 or 631(b) of the Internal Revenue Code of 1954.

V.

"The aforementioned sales of logs or timber do not constitute a disposal of timber with a retained economic interest as required by said sections.

VI.

"Moreover, said timber and logs were not held for more than six months before the date of disposal, if any, as required by said sections.

tion for set off was ignored both by the parties and the trial court because the applicability of section 117(k)(2) of the 1939 Code or section 631(b) of the 1954 Code was not brought into play at the trial.

The fact that the respondent, District Director affirmatively abandoned any reliance upon the motion is indicated by his conduct of the trial as well as his request at the conclusion of the trial of Defendant's Requested Instruction No. 4 in which the Commissioner's determination was reiterated that petitioners were entitled to capital gain treatment of timber held over six months sold by the partnership to the corporation. In the conduct of the trial the same proposition stated in Defendant's Requested Instruction No. 4 with reference to long term capital gain on timber sales was stated time and again in testimony and exhibits offered by the respondent District Director. For example, Chelsie J. Mills, the Internal Revenue Agent, who made the investigation resulting in one of the basic Revenue Agent Reports, testified concerning long and short term capital gains on the sale of timber as follows:

"* * *

VII.

"Moreover, neither the plaintiffs nor the partnership elected to come under the provisions of Sections 117(k)(1) of the Internal Revenue Code of 1939 or Section 631(a) of the Internal Revenue Code of 1954, as required by law.

VIII.

"The amount of this set-off is not presently known. Such amount is a matter of computation and can be determined within a short period of time. However, it is believed that the defendant's total set-off is greater than the amount prayed for by all of the plaintiffs in these consolidated cases.

WHEREFORE, defendant prays that the set-off be granted and the plaintiffs' complaint be dismissed with costs.")

"A. Now there is four types. One is fee land and three lease transactions. The first is the lease that they had which I call prior, leases that would give them many years, I recall seeing them four or five years, in which to remove the standing timber. The next is lease land long-term. That is the land on which they owned the timber and Mr. Abernathy's records showed that they would hold that as much as six months or longer before they cut it. *If they held it over six months it was my understanding it would be reportable as long-term capital gain.* And the lease lands ordinary represented those tracts which were not held six months, *which would be short term gain.* Also prior to 1954 another one in the latter category, there were very few but there were some cutting contracts. So that term lease sales ordinarily will include some timber for which they had a contract right to cut which they held in excess of six months.

That is the four designated types of land from which they cut." (Emphasis supplied), (R. 483).

The testimony of other witnesses, Mr. Roger D. Huff, forest evaluation engineer of the Internal Revenue Service and Mr. J. R. Bradley, consulting forester, and all exhibits offered by respondent District Director, without exception, were predicated upon the six months' holding period as the sole test for determining capital gains on timber sales. Both parties were firmly committed to that theory in the trial of the case.*

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*(A summary of the data showing the theory of this case as tried is as follows:

(a) The complaints and answers (R. 1, 64, *et seq.*; 144, 153, *et seq.*).

(b) Commissioner's determination as made in Revenue Agent's Report, accompanying 90 day letter dated June 24, 1955 (Deft. Ex. 2, R. 975, *et seq.*).

All of the evidence was heard by both the court and the jury. At the conclusion of the evidence the respondent District Director requested the court to give at his request Defendant's Requested Instruction No. 4 which reads in part as follows:

"Defendant's Requested Instruction No. 4

* * *

"You will notice from the questions I am going to hand you to take into the jury room that you are asked to determine the fair market value of timber held for six months or less and for timber held for more than six months. *This separation is important because the tax treatment is different. Timber held for more than six months is subject to capital gains tax while timber held for six months or less before the cutting date is subject to ordinary income tax rates.* Therefore, your answers will separate the two for each of the years in question. This means that you must first determine which timber was held for more than six months before cutting and which was held for six months or less. After separating the two you must determine the fair market value of each upon the cutting date." (Emphasis supplied) (R. 552, 553).

(c) Pre-trial Order of the Court (R. 160).

(d) The testimony of the following witnesses, among others, was predicated upon the basis that capital gain treatment applied to timber sold after being held more than six months while timber sold after being held six months or less was subject to taxation at ordinary rates, as stated in Defendant's Requested Instruction No. 4:

Plaintiff's witnesses: E. L. Harris.

Defendant's witnesses: Chelsie J. Mills, John Ross Bradley, Jr., and Roger D. Huff.

(e) Exhibits prepared on the basis of the law as stated in Defendant's Requested Instruction No. 4 were as follows:

There was no prior statement of the law or ruling of the trial court applicable to the long term capital gain treatment on timber sales to that contained in the above quoted instruction given by the court at the request of the respondent District Director. Immediately following the giving of that charge, the court submitted special interrogatories to the jury dealing with timber and realty sales. At the time that the special interrogatories were submitted to the jury both the petitioners and the respondent District Director informed the jury both in argument and by writing upon the interrogatories, the amount of long term capital gains to which each party respectively contended petitioners were entitled. All of the special interrogatories submitted to the jury and their responses thereto were as follows:

Plaintiff's Exhibits: Partnership tax returns for Belcher Land & Timber Company for the years 1950-1955 (Pl. Exs. 23, 24 and 25, R. 773, *et seq.*; Deft. Exs. 3, 4 and 5, R. 1016, *et seq.*).

Belcher Land & Timber Company Analysis of Timber Depletion Held Less than Six Months, Held More Than Six Months (Pl. Ex. 32, R. 820).

Belcher Land & Timber Company Analysis of Timber and Timber Depletion (Pl. Ex. 33, R. 822).

Belcher Land & Timber Company Sale of Timber Compared with Revenue Agent's Report 1950-1955, Inclusive, shows breakdown between short term and long term sales (Pl. Ex. 34, R. 830).

Defendant's Exhibits: Commissioner's determination in Revenue Agent's Report dated June 24, 1959, accompanying 90 day letter (Deft. Ex. 2, R. 975, *et seq.*).

Analysis of Belcher Land & Timber Company Timber Purchases and Timber Quantities Sold to Corporation (Deft. Ex. 26, R. 1045).)

Interrogatory No. 1

Taxpayer's Value — $369,432.27
Government's Value — $340,727.29

What do you find to have been the fair market value of timber sold by Belcher Land and Timber Company to W. A. Belcher Lumber Company, Inc., during the year 1950?

$369,432.27
s/ Foste F. Oliver,
Foreman.

Filed in Clerk's Office, Northern District of Alabama, September 30, 1960, William E. Davis, Clerk, United States District Court, By Mary L. Tortorici, Deputy Clerk.

(Clerk's notation of filing is the same on each interrogatory and is omitted in the following interrogatories.)

Interrogatory No. 2

Taxpayer's Value — $522,895.53
Government's Value — $416,029.41

What do you find to have been the fair market value of timber sold by Belcher Land and Timber Company to W. A. Belcher Lumber Company, Inc., during the year 1951?

$522,895.53
s/ Foster F. Oliver,
Foreman.

Interrogatory No. 3

Taxpayer's Value — $324,636.81
Government's Value — $286,332.61

What do you find to have been the fair market value of such sales of timber held for more than six months during the year 1950?

$314,000.00

s/ Foster F. Oliver,
Foreman.

Interrogatory No. 4

Taxpayer's Value — $508,226.96
Government's Value — $319,689.70

What do you find to have been the fair market value of such sales of timber held for more than six months during the year 1951?

$461,000.00

s/ Foster F. Oliver,
Foreman.

Interrogatory No. 5

Taxpayer's Value — $495,257.06
Government's Value — $398,046.07

What do you find to have been the fair market value of timber sold by Belcher Land and Timber Company to W. A. Belcher Lumber Company, Inc., during the year 1952?

$495,257.06

s/ Foster F. Oliver,
Foreman.

Interrogatory No. 6

Taxpayer's Value — $512,222.71
Government's Value — $449,965.69

What do you find to have been the fair market value of timber sold by Belcher Land and Timber

Company to W. A. Belcher Lumber Company, Inc., during the year 1955?

$512,222.71

s/ Foster F. Oliver,
Foreman.

Interrogatory No. 7

Taxpayer's Value — $475,648.29
Government's Value — $318,547.42

What do you find to have been the fair market value of such sales of timber held for more than six months during the year 1955?

$435,000.00

s/ Foster F. Oliver,
Foreman.

Interrogatory No. 8

Taxpayer's Value — $161,960.59
Government's Value — $251,018.94

What do you find to have been the fair market value of such sales of timber held for more than six months during the year 1955?

$183,000.00

s/ Foster F. Oliver,
Foreman.

Interrogatory No. 9

Taxpayer's Value — $495,065.67
Government's Value — $409,998.62

What do you find to have been the fair market value of the timber sold by the partnership to the cor-

poration for the corporation's taxable year ended June 30, 1951?

$495,065.67
s/ Foster F. Oliver,
Foreman.

Interrogatory No. 10

Taxpayer's Value — $530,187.82
Government's Value — $415,654.48

What do you find to have been the fair market value of the timber sold by the partnership to the corporation for the corporation's taxable year ended June 30, 1952?

$530,187.82
s/ Foster F. Oliver,
Foreman.

Interrogatory No. 11

Was the "Allendale" tract held primarily for sale to customers in the ordinary course of trade or business of the partnership?

During the year 1950?—No—(Yes or No)
During the year 1951?—No—(Yes or No)
During the year 1952?—No—(Yes or No)
During the year 1954?—Yes—(Yes or No)
During the year 1955?—Yes—(Yes or No)
s/ Foster F. Oliver,
Foreman.

Interrogatory No. 12

Was the property referred to in the evidence as "Payne Sales from the Crawford Tract" held primarily for sale to customers in the ordinary course of trade or business of the partnership:

During the year 1954?—No—(Yes or No)
During the year 1955?—No—(Yes or No)
s/ Foster F. Oliver,
Foreman.
(R. 562-568)

The jury verdict was returned on September 30, 1960. Thereafter, on October 10, 1960, the Court incorporated in one document the jury verdict on special interrogatories and the findings of fact and conclusions of law, among which, consistent with the jury verdict with respect to capital gain treatment of timber sold, were the following:

Findings of Fact

* * *

"9. The sales of timber made for each of the years 1950 to 1955, inclusive, by Belcher Land and Timber Company, a partnership, to W. A. Belcher Lumber Company, a corporation, were not made of property held primarily for sale to customers in the ordinary course of trade or business of Belcher Land and Timber Company, a partnership." (R. 581, 582)

* * * *

Conclusions of Law

* * *

"4. The sales of Timbe made by the Belcher Land and Timber Company, a partnership, to the W. A. Belcher Lumbar Company, a corporation, during the years 1950, 1951, 1952, 1954 and 1955, of timber held for more than six mo ths are entitled to capital gain treatment under the appropriate provisions of the Internal Revenue Code of 1939 or 1954 as the case may be." (R. 584).

Thereafter, judgments were computed and entered for the amount of the refund to which petitioners were entitled

under the jury verdicts on special interrogatories and findings of fact and conclusions of law of the Court. (R. 586 *et seq.*):

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I

The Decision of the Court of Appeals Reversing the Judgment of the District Court Entered upon the Jury Verdict on Special Interrogatories Responsive to the Charge of the District Court Given in Defendant's Requested Instruction No. 4 Violates the Provisions of the Seventh Amendment of the Constitution Limiting the Scope of Review of Jury Verdicts in Courts of the United States in Suits at Common Law.

The consolidated civil actions for a refund of federal income taxes for the years 1950-1955 (except 1953) instituted by petitioners against the respondent District Director in the District Court are common law actions. *Sage* v. *United States*, 250 U.S. 33, 37, 39 S. Ct. 415, 63 L. Ed. 828; *Smietanka* v. *Indiana Steel Company*, 257 U.S. 1, 42 S. Ct. 1. 66 L. Ed. 99. A jury trial was demanded by petitioners. In the pre-trial order in the District Court all issues made by the pleadings were formulated into special interrogatories for submission to the jury at the conclusion of the trial. After the trial commenced, it was agreed that all of the issues as stated in the pre-trial order relating to timber sales and realty sales should be submitted to the jury while all of the other issues as stated in the pre-trial order should be determined by the court. Hence, as to all issues triable by jury, which included any issue related to timber sales, petitioners are entitled to the protection of the Seventh Amendment of the Constitution of the United

States: *Atlantic and Gulf Stevedores* v. *Ellerman Lines, Ltd., et al.*, U.S. , 82 S. Ct. , 7 L. Ed. 798; *Dairy Queen, Inc.*, v. *Wood*, U.S. , 82 S. Ct. , 8 L. Ed. 2d 44.

The right to jury trial under the Seventh Amendment is one of the fundamental rights guaranteed by the Constitution. Any decision of a court of the United States encroaching upon that right should be struck down by this Court. See: *Gianfala* v. *Texas Company*, 350 U.S. 879, 76 S. Ct. 141, 100 L. Ed. 775. In no field of civil litigation is the right of trial by jury and the proper division of responsibility between the court and jury more essential than in tax refund suits. Regardless of the importance of particular litigation, however, the supervisory powers of this Court should be exercised in any case in which the constitutional right of any litigant under the Seventh Amendment is infringed by a court of the United States. *Beacon Theatres, Inc.*, v. *Westover*, 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. 988. The importance of the right to jury trial under the Seventh Amendment transcends all other considerations and "any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick* v. *Schiedt*, 293 U.S. 474, 486, 55 S. Ct. 296, 79 L. Ed. 603, 611, 95 A.L.R. 1150.

The aim of the Seventh Amendment has been succinctly stated in a decision of this Court as follows:

> "The aim of the Amendment, as this Court has held, is to preserve the substance of the common law right of trial by jury, as distinguished from mere matters of form or procedure, *and particularly to retain the common law distinction between the province of the Court and the jury*, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of

fact are to be determined by the jury under appropriate instructions by the court." (Emphasis supplied).

Baltimore & Carolina Line v. *Redman*, 295 U.S. 654, 55 S. Ct. 890, 79 L. Ed. 1636.

See also: *Walker* v. *New Mexico & S. P. R. Co.*, 165 U.S. 593, 596, 17 S. Ct. 421, 41 L. Ed. 837; *Gasoline Products Co.*, v. *Champlin Ref. Co.*, 283 U.S. 494, 51 S. Ct. 513, 75 L. Ed. 1188.

The continuing vitality of the Seventh Amendment has been strongly reaffirmed by this Court in the recent decisions of *Atlantic and Gulf Stevedores* v. *Ellerman Lines, Ltd.* (*supra*), *Dairy Queen, Inc.*, v. *Wood* (*supra*) and *Beacon Theatres, Inc.*, v. *Westover* (*supra*).

In the case at bar, the judgment of the District Court for refund of income taxes for the years 1950, 1951, 1952 and 1955, was based upon the jury verdict on special interrogatories responsive to Defendant's Requested Instruction No. 4, establishing the amount of timber sold by the partnership to the corporation entitled to long term capital gain treatment under the provisions of section 117(a) of the Internal Revenue Code of 1939, and section 1221(1) of the 1954 Internal Revenue Code as applied to the respective years*.

Ordinarily in order for timber to qualify for capital gain treatment under section 117(a) of the 1939 Code or section 1221(1) of the 1954 Code, the six months holding period requirement must be met and it must be shown that

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*(The judgment also reflected the amount of such timber entitled to long term capital gains treatment for 1954 in accordance with the determination of the Commissioner of Internal Revenue which was not contested by petitioners in the refund suit for that year although other issues not here material were involved for that year.)

such "timber was not held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." *Ah Pah Redwood Co.* v. *Commissioner*, 9th Cir., 1957, 251 F.2d 163, 168. In the instant case, however, only the holding period was at issue inasmuch as the jury was instructed by the Court at the request of the respondent District Director under Defendant's Requested Instruction No. 4 as follows:

"Defendant's Requested Instruction No. 4.

* * *

"You will notice from the questions I am going to hand to you to take into the jury room that you are asked to determine the fair market value of timber held for six months or less and for timber held for more than six months. *The separation is important because the tax treatment is different. Timber held for more than six months is subject to the capital gains tax while timber held for six months or less before the cutting date is subject to ordinary income tax rates. Therefore your answers will separate the two for each of the years in question.* This means that you must first determine which timber was held for more than six months before cutting and which was held for six months or less. After separating the two, you must determine the fair market value of each upon the cutting date." (Emphasis supplied). (R. 552, 553).

The above quoted instruction plainly states that the effect of the verdict shall be to establish the amount of timber to be taxed at capital gain rates. There was no error in the charge under the issues as tried in the District Court, Had there been error in the instruction, however, the respondent District Director was in no position to complain either in the District Court or on appeal of any jury verdict responsive to that charge establishing the amount of timber

entitled to long term capital gain. For a party cannot complain of error for which he himself is responsible or of the giving of a charge requested by him.

Matheson v. *U. S.*, 227 U.S. 540, 33 S. Ct. 355, 57 L. Ed. 631.

Kentucky-West Virginia Gas Co. v. *Lafferty*, 6th Cir. 1949, 174 F.2d 848.

See also:

Mach v. *Abbott Co.*, 8th Cir. 1943, 136 F.2d 7, cert. den. 320 U.S. 773.

The Court of Appeals in reviewing the jury verdict was also restricted to the law of the case as given by Defendant's Requested Instruction No. 4. This rule is stated in American Jurisprudence as follows:

> "The well settled rule which requires the parties to adhere on appeal to the theory upon which they presented the case in the trial court operates to limit the scope of review, since the authorities are agreed on the proposition that the case, on appeal, must be reviewed and decided on the theory on which it was tried in the court below, and that the theory upon which the case was submitted in the trial court should be treated as the law of the case on appeal."
>
> 3 *Am. Jur., Appeal and Error*, Sec. 830, p. 372.

To the same effect see *Virginia Railroad Co.* v. *Mullens*, 271 U.S. 220, 46 S. Ct. 526, 70 L. Ed. 915, 920, holding that plaintiff cannot change the theory of his case on appeal to one "which the defendant was not required to meet below".

Defendant's Requested Instruction No. 4 as the law of the case was entirely and solely consistent with the theory upon which the case was tried in the District Court by the respondent District Director. In the trial court from be-

ginning to end he affirmatively defended the determination of the Commissioner that the partnership was entitled to long-term capital gain on all timber sold to the corporation held over six months. The jury verdict, therefore, in response to Defendant's Requested Instruction No. 4 established the amount of timber entitled to capital gain treatment.

The Court of Appeals, ignoring the instructions to the jury and the theory upon which the case was tried, erroneously reviewed the judgment as if it were based upon the findings of fact and conclusions of law of the District Court instead of being based, as it was, on the jury verdict on special interrogatories pursuant to the law of the case as given by the Court in Defendant's Requested Instruction No. 4, for the years 1950, 1951, 1952 and 1955, and upon the determination of the Commissioner of Internal Revenue not contested by petitioners for the year 1954.

The reversal of that judgment by the Court of Appeals is a violation of petitioners' right to a jury trial and the review of the jury verdict as guaranteed by the Seventh Amendment. The violation of petitioners' right to jury trial is so patent on the record that the judgment of the Court of Appeals should be summarily reversed and the judgment of the District Court reinstated as was done in *Gianfala* v. *Texas Company* (*supra*).

The Court of Appeals undertook to adjudicate with finality a purported separate issue raised for the first time on appeal of whether the timber was held by the partnership primarily for sale to customers in the ordinary course of its trade or business. This question was necessarily conceded favorably to petitioners in the District Court under the issues formulated in the pre-trial order and the requirement for capital gain treatment of timber as stated

in Defendant's Requested Instruction No. 4. The incredible misunderstanding of the record and the issues by the Court of Appeals is apparent from an examination of the first opinion and the extended opinion of that court on petition for rehearing. The opinions are in conflict with each other in important respects and both opinions are wrong.

In the trial in the District Court, all of the issues related to timber sales and realty sales were jury issues from the initial jury demands in the complaints to the final conclusion of the cases by the entry of the judgments in the District Court. The Court of Appeals reviewed the jury verdict with respect to realty sales in accordance with the Seventh Amendment holding "the verdict of the jury is clearly sustainable upon the evidence".

Why did the Court of Appeals obey the command of the Seventh Amendment in reviewing the jury verdict as to realty sales while disregarding the command of the Seventh Amendment in reviewing the jury verdict with respect to timber sales? Ostensibly the Court of Appeals was misled in the first opinion by its erroneous reading of the record to assume that the District Judge had entered his findings of fact and conclusions of law prior to the submission of the case to the jury, thereby undertaking a determination of the issues related to timber sales instead of the jury. (As the record shows the jury verdict on special interrogatories was entered September 30, 1960, and the court later on October 10, 1960, entered findings of fact and conclusions of law.) (R. 546-550; 575). The first opinion of the Court of Appeals was therefore based on the logic (predicated upon an erroneous premise) that the "*subsequent* interrogatories were submitted to the jury distinguishing long term gains from short term gains *necessarily followed*" from the supposed earlier ruling of the District Court. *The record shows that the District Judge had made*

no ruling on capital gain treatment of timber sales prior to submission of the special interrogatories to the jury, except in the charge to the jury at respondent District Director's request that timber held over six months sold by the partnership to the corporation was entitled to be taxed at capital gains rates as stated in Defendant's Requested Instruction No. 4. Consequently, Defendant's Requested Instruction No. 4 was the only ruling of the Court on capital gains on timber sales which preceded the submission of the case to the jury on special interrogatories.

Furthermore, the Court of Appeals did not appear to grasp that long prior to the trial the interrogatories had been formulated in the pre-trial order, to be submitted to the jury "distinguishing long term gains from short term gains" as the only controversial issue to be decided in determining long term capital gain on timber sales. These issues as so framed in the pre-trial order "controlled the subsequent course of the action" under Rule 16 of the Federal Rules of Civil Procedure because such statement of issues was never modified.

Under the complaints and answers, which were the source of issues stated in the pre-trial order, there was never any issue between the parties as to whether petitioners were entitled to long term capital gain on the sale of timber held over six months. Both parties treated any timber held over six months sold by the partnership to the corporation as being entitled to be taxed at capital gain rates. The Commissioner had determined that the partnership was in fact entitled to long term capital gain on timber held over six months which was sold in the following amounts:

Commissioner's Determination Amount of Long Term Capital Gain—Timber.

1950	$288,481.06
1951	321,886.39
1952	322,099.74
1954	146,717.52
1955	264,698.94

(Deft. Ex. 2, R. 975, *et seq.*; Pl. Ex. 34, R. 830.)

The respondent District Director in his answer and in his conduct of the trial affirmatively defended the Commissioner's determination. The petitioners, disagreeing with the Commissioner as to the value and amounts of footage of timber held over six months which was sold, contended the proper amounts of timber entitled to long term capital gain treatment were as follows:

Petitioners' Amount of Long Term Capital Gain—Timber.

1950	$324,636.81
1951	508,226.96
1952	475,648.29
1954	Commissioner's Determination Not Contested
1955	161,960.59

(Pl. Ex. 34, R. 830.)

Under the issues thus made, *there was and could be no reason for fomulating in the pre-trial order a special interrogatory for submission to the jury to find the amount of timber held over six months sold by the partnership to the corporation other than to have a determination by the jury verdict in response thereto of the amount of timber entitled to long term capital gain treatment for entry of judgment based upon the jury determination, and the pre-trial order provided that the answers to the special interrogatories*

should form the basis of the judgment (R. 163, 164). At the conclusion of the evidence this reason for the interrogatories was expressly stated by the trial court in Defendant's Requested Instruction No. 4 at the request of the Respondent District Director.

Immediately following the Court's charge to the jury which, of course, included Defendant's Requested Instruction No. 4, the respondent District Director stated and represented to the Court and jury in the special interrogatories submitted to the jury the correct value of timber entitled to long term capital gain treatment under Defendant's Requested Instruction No. 4 for each of the years. Such value, so represented by the respondent District Director, together with the petitioners' value and the jury verdict is summarized as follows:

Year	Government's Value*	Taxpayer's Value	Jury Verdict
1950	$286,332.61	$324,636.81	$314,000.00 (R. 547)
1951	349,639.70	508,226.96	461,000.00 (R. 547, 548)
1952	348,547.42	475,648.29	435,000.00 (R. 548, 549)
1954	No Interrogatories Submitted Because No Issue for 1954		
1955	251,018.94	161,960.59	183,000.00 (R. 549)

The jury verdict upon special interrogatories therefore in response to Defendant's Requested Instruction No. 4, constituted a determination that petitioners were entitled to long term capital gain on timber sales in the amounts shown above by the jury verdict for each of the years. Petitioners had the right under the Seventh Amendment to

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*(The government's value stated on the interrogatories submitted to the jury is based on evidence of the respondent District Director offered at the trial in defense of the Commissioner's determination slightly differing in amounts from the Commissioner's determination.)

entry of judgment on the verdict forthwith, without any further findings or rulings by the Court.

The District Court, contrary to the extended opinion of the Court of Appeals on petition for rehearing, had no jurisdiction to disturb the jury verdict establishing the amount of timber entitled to long term capital gain treatment in the absence of a timely motion for new trial or motion for judgment n.o.v. by the respondent District Director. The respondent District Director was in no position to make either of such motions in view of the Defendant's Requested Instruction No. 4 given by the Court at his request and his previous conduct of the trial defending the Commissioner's determination that the partnership was entitled to long term capital gain treatment on timber sales.

Therefore, the District Court was powerless under the Seventh Amendment of the Constitution of the United States as well as under the orderly trial procedure prescribed in Federal Rules of Civil Procedure to disturb or otherwise interfere with the jury verdict which determined the amount of timber sales entitled to long term capital gains.

The Court of Appeals had no more power under the Seventh Amendment to interfere with the jury verdict than did the District Court. In the case presented on the record neither the District Court nor the Court of Appeals had the power to interfere with the verdict.

The findings of fact and conclusions of law entered by the District Director consistent with the jury verdict under Defendant's Requested Instruction No. 4 added nothing to the "efficacy" of the jury verdict. *The Conclusion of Law No. 4 to the effect that "sales of timber held for more than six months are entitled to capital gain treatment" is precisely the same as the law stated in*

Defendant's Requested Instruction No. 4 and the finding of fact No. 9 that such sales "were not made of property held primarily for sale to customers in the ordinary course of trade or business" of the partnership is the uncontested basis of Defendant's Requested Instruction No. 4. The petitioners were entitled to exactly the same judgment for refund reflecting long term capital gains on timber sales based solely on the jury verdict whether or not the District Court indicated agreement therewith. The entry of such findings of fact and conclusions of law were of a non-controversial nature so long as they were consistent with the jury verdict.

The suggestion in the extended opinion of the Court of Appeals on petition for rehearing that the jury verdict did not have "efficacy" under the entry of findings of fact and conclusions of law by the court is a complete about face from the first opinion. In the first opinion the thesis was that the jury verdict was effective "in distinguishing long term gains from short term gains" because it "necessarily followed" from the findings of fact and conclusions of law which the Court of Appeals erroneously supposed preceded the jury verdict. Faced with the correct sequence of events, as shown by the record, the Court of Appeals changed its view of the finality of the jury verdict by adopting the view that the jury verdict was conditioned upon later findings by the court consistent therewith. There was no qualification or reservation in the court's charge to the jury or elsewhere in the record postponing the "efficacy" of the jury verdict pending any findings of the court or in anywise qualifying the verdict as conditional.

On the contrary, the District Court and the respondent District Director were committed in the charge to the jury as contained in Defendant's Requested Instruc-

tion No. 4 as the "law of the case" that the jury verdict finding the amount of timber held over six months thereby established that such timber was taxable at capital gain rates.

This case is a hundred fold stronger for the invocation of the Seventh Amendment to prevent interference with the jury verdict than was the situation in *Atlantic and Gulf Stevedores, Inc., supra.* There the jury verdict on special interrogatories was only sustainable on the least attractive of several possible theories. Nevertheless, the command of the Seventh Amendment required that the jury verdict be upheld. Here, on the contrary, there is no rational basis to upset the jury verdict responsive to the charge of the court determining the amount of timber entitled to capital gain treatment.

Under the decisions of this Court, the jury verdict must be upheld. *Atlantic and Gulf Stevedores, Inc.*, v. *Ellerman Lines* (*supra*).

II.

The Court of Appeals Denied Petitioners the Right of Trial by Jury Guaranteed by the Seventh Amendment by the Final Adjudication on Appeal As a Separate Issue the Factual Question of Whether Timber Was Held by the Partnership Primarily for Sale to Customers in the Ordinary Course of the Trade or Business of the Partnership Without Providing That Such Issue Be Initially Presented for Determination of a Jury Subject to Review Prescribed in the Seventh Amendment.

The Seventh Amendment provides that "no fact tried by jury shall be otherwise re-examined in any court of the United States, than according to the rules of the com-

mon law." The settled rules for review of jury verdicts at common law were authoritatively stated in an early opinion of this Court as follows:

> "The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings."
>
> *Parsons* v. *Bedford et al.*, 3 Pet. 433, 7 L. Ed. 732, 737.

In the extended opinion, the Court of Appeals finds a factual issue which was not submitted to the jury to be a separate issue "indispensable to a final adjudication of this cause" and finally adjudicates the issue on appeal without providing for its submission to the jury in a new trial. The separate issue is whether "the taxpayer held the timber primarily for sale to customers in the ordinary course of the trade or business". With regard thereto, it is conceded in the extended opinion that no such "issue" was presented in or to the trial court when the case was submitted to the jury as follows:

> "It was either assumed by the parties that the timber was not held primarily for sale to customers in the ordinary course of trade or business, or eith[illegible] or both of the parties completely failed to bring this issue to the Court's attention *at the time that the interrogatories were submitted to the jury.*"
>
> Extended Opinion, Petition for Rehearing, Appendix, pp. 50-51.

Had this "issue" been properly presented as a controversial issue under the pre-trial order as a result of the pleadings, then, doubtless, it would have been a factual issue for determination by the jury. See:

Ah Pah Redwood Co. v. *Commissioner*, *supra*. That very issue, made a controversial issue by the pleadings with respect to realty sales and incorporated as a controversial issue in the pre-trial order, was submitted to the jury in special interrogatories in this case.

This "issue" had not been made by the pleadings with respect to timber sales and hence was not included in the stipulation of the issues to be submitted to the jury in special interrogatories contained in the pre-trial order. Furthermore, the respondent District Director waived any such "issue" when at his request in Defendant's Requested Instruction No. 4, the Court charged the jury as the "law of the case" that the tax treatment of timber held over six months is different because:

> "Timber held for more than six months is subject to capital gains tax while timber held for six months or less before the cutting date is subject to ordinary income tax rates."
> (R. 552, 553.)

Nevertheless, despite the quoted instruction, the Court of Appeals in the extended opinion holds that the jury verdict did not have "efficacy" until the District Judge dealt with this "issue" after the jury verdict as explained in the extended opinion as follows:

> "Since the District Court later found that the timber was not held primarily for sale to customers in the ordinary course of trade or business, the findings of the jury with respect to fair market value have efficacy. Had the court found, even after the jury's verdict, that the timber was held primarily for sale to customers in the ordinary course of trade or business irrespective of the jury verdicts the taxpayers would not be entitled to capital gain. What the District Court did was, in effect, submit the question of damages to the jury *prior* to determining or having determined itself the question of liability.

> "We hold, therefore, that the issue was properly raised in the Court below that the District Court made a finding of fact on this very point at issue." (Emphasis supplied).
>
> Extended Opinion, Petition for Rehearing, Appendix, p. 51.

The extended opinion fails to afford a rational answer to several important questions related to the orderly trial of cases under the requirements of the Seventh Amendment and the Federal Rules of Civil Procedure.

The extended opinion is silent as to the means by which the "issue" was "properly raised in the Court below". In the first opinion the Court of Appeals re-wrote the motion for setoff filed on behalf of respondent District Director one day before the commencement of the trial as if it had stated:

> "Therefore, the Director says, the timber held by the partnership was its stock in trade, *so to speak*, and was accordingly, held primarily for sale to customers in the ordinary course of its trade or business." (Emphasis supplied). First Opinion, Appendix, p. 33.

Actually, the motion contained no such language verbatim or in substance and it was not explained in the first opinion how this motion raised this question. As pointed out in the petition for rehearing, that motion dealt only with the lack of involvement of section 117(k)(2) of the 1939 Code and section 631(b) of the 1954 Code in this case. Inasmuch as section 117(a) of the 1939 Code and section 1221(1) of the 1954 Code were the Code sections relied upon in the District Court with respect to capital gain treatment of timber the motion was ignored by both the court and the parties in the District Court as being inapt without any ruling being made thereon. Also, as pointed out in the petition for rehearing Defend-

ant's Requested Instruction No. 4 would constitute a waiver of any reliance upon the motion for setoff even as rewritten in the first opinion. Presumably these statements in the petition for rehearing caused the Court of Appeals to agree that the motion for setoff was inefficacious for any purpose in view of the statement in the extended opinion, as above quoted, to the effect that the parties assumed that the timber was not held primarily for sale to customers in the ordinary course of the trade or business or the parties failed to bring the matter to the court's attention.

Moreover, there was no motion for new trial after the jury verdict and the extended opinion sheds no light as to the means by which the Court of Appeals deemed that the "issue" was "properly raised in the Court below" after the jury verdict.

Furthermore, the "issue" was not raised before the jury verdict as previously argued and there was no conditional submission of the case to the jury, subject to any further action by the court, in the court's charge or elsewhere in the record. There was no reservation whatsoever of this "issue" by the court for decision. In the absence of a conditional submission to the jury under proper instruction or a timely and proper motion for new trial, how could the District Court properly take any subsequent adverse action affecting the jury verdict? Neither under the rules of the common law as provided in the Seventh Amendment nor under the Federal Rules of Civil Procedure is any such usurpation of jurisdiction countenanced.

There is the additional confusion in the extended opinion of the Court of Appeals as to what type of further action of the District Court was thought to be necessary to give the jury verdict "efficacy". In one sen-

tence, the extended opinion speaks of the District Court's determination of a "question of liability" as if it were purely a question of law and in the next sentence the extended opinion states "that the District Court made a finding of fact on this very point at issue". The question of whether timber is held primarily for sale to customers in the ordinary course of the trade or business of the taxpayer is certainly a factual issue when properly presented as a controversial issue. Such an issue is for the jury and the federal courts under the Seventh Amendment could not make any reservation with respect to such a factual issue inasmuch as such practice at common law covered questions of law only. See: *Baltimore & C. Line* v. *Redman, supra.*

Furthermore, where as in the instant case, there is no reservation by the trial court as to the issue involved upon submission to the jury, the appellate court has no authority to adjudicate the issue and consequently upon reversal—a new trial is mandatory. *Slocum* v. *New York Life Insurance Company*, 228 U.S. 364, 33 S. Ct. 523, 57 L. Ed. 879.

The extended opinion is inextricably confused between the respective functions of the court and jury in the trial of the issue involving capital gains on timber sales. This much is clear, however. In the event it be possible and is determined despite the position taken in the conduct of the trial by the respondent District Director, culminating in his request for Defendant's Requested Instruction No. 4, that an issue of fact survived the jury verdict to be adjudicated with respect to whether the timber was held primarily for sale to customers in the ordinary course of the trade or business of the taxpayer, then under the Seventh Amendment petitioners have the right to have a jury determination of that issue

in a new trial subject to re-examination as provided in the Seventh Amendment. *Parsons* v. *Bedford et al., supra; Slocum* v. *New York Life Insurance Co., supra, cf. Baltimore & Carolina Line* v. *Redman, supra.*

III.

Whether Property Sold to a Single Vendee Constitutes Property Held Primarily for Sale to Customers in the Ordinary Course of the Trade or Business of Taxpayer Is a Factual Issue for the Determination of the Trier of Fact, Subject to Review under the Clearly Erroneous Rule, and the Contrary Decision of the Court of Appeals Is in Conflict with the Decision of the Ninth Circuit Court of Appeals in Jantzer v. Commissioner, 9th Cir., 1960, 284 F.2d 348.

Assuming, despite the contrary position of petitioners, (a) that the question of whether the timber sold by partnership to the corporation was property held primarily for sale to customers in the ordinary course of the trade or business of the partnership constituted a controverted issue for separate adjudication in the District Court; and (b) that such factual issue was for the court and not the jury to decide, then we submit that the finding of fact of the court on the issue must be affirmed unless clearly erroneous.

The determination of the Commissioner of Internal Revenue with respect to timber sales involved in these cases related only to timber sold by the partnership to the corporation and his determination was that such sales were entitled to long term capital gain treatment if the timber was held over six months. *Consequently, the issue litigated in the refund suits in the District Court of how much timber qualified for long term capital gains was limited to sales to a single vendee.*

There are several cases of the Tax Court of the United States holding that sales to a single vendee do not constitute sales to "customers" within the meaning of statutory provisions similar to Section 117(a) of the 1939 Code, and Section 1221(1) of the 1954 Code, denying the status of capital asset to "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."

Estate of M. M. Stark v. *Commissioner*, 45 BTA 882;

Isaac S. Peebles v. *Commissioner*, 5 T.C. 14;

Camp Manufacturing Co. v. *Commissioner*, 3 T.C. 467;

Contra: *Jantzer* v. *Commissioner*, 32 T.C. 161.

In the leading case of *Estate of M. M. Stark* v. *Commissioner, supra,* the owners of growing timber sold their timber to a corporation, Weir Long Leaf Lumber Co., which cut and removed the timber for which it paid the owners regularly at contract prices. The arrangement in *Stark* is for all practical purposes the same as that in the instant case. It was held in *Stark*:

> "We think it plain in this case that the standing timber on the lands of the petitioners was not 'held' by them 'primarily for sale to customers in the ordinary course of' their 'trade or business' within the intendment of section 117(b). The petitioners had no 'customers'. All of the sales were to Weir Long Leaf Lumber Co. pursuant to the contract of February 12, 1917. The petitioners had no 'trade or business' as that term is commonly understood. Where the petitioners owned the standing timber for a period of more than one year at date of sale the sales were of capital assets within the meaning of section 117 (a) and the petitioners were taxable accordingly."
>
> *Estate of M. M. Stark* v. *Comm'r*, 45 BTA 882, 888.

To the same effect see *Isaacs S. Peebles* v. *Commissioner*, 5 T.C. 14 and *Camp Manufacturing Co.* v. *Comm'r*, 3 T.C. 467.

In the case of *Jantzer* v. *Commissioner*, 32 T.C. 161, the Tax Court held contrary to the earlier Tax Court decisions cited above without mentioning them.

In reviewing the Tax Court decision in *Jantzer*, the Circuit Court of Appeals for the 9th Circuit, held that the Tax Court as the trier of facts was "not clearly erroneous" in finding that standing timber sold to a single vendee was "property held by the taxpayers primarily for sale to customers in the ordinary course of its trade or business" and consequently was not a "capital asset" as defined in Section 117(a) (1) (A). *Jantzer* v. *Commissioner*, 9th Cir., 1960, 284 F.2d 348.

In the instant case the Court of Appeals reviewed the identical question of fact which the 9th Circuit reviewed in the *Jantzer* case free of the "clearly erroneous rule" although it is obvious that conflicting inferences can clearly be drawn from the undisputed fact that sales are made to only *one vendee*, and not to customers. In *Jantzer*, the Ninth Circuit reviewed this identical question as being subject to the "clearly erroneous rule".

In *Gianfala* v. *Texas Company, supra*, this Court summarily reversed the decision of the Court of Appeals for the Fifth Circuit (*The Texas Company* v. *Gianfala*, 5th Cir., 1955, 222 F.2d 382) which had set aside a judgment, based upon plaintiff's intestate being a seaman and a "member of the crew" under the Jones Act, on the theory that the facts being undisputed the Court of Appeals was free to reach a legal conclusion therefrom. The direction of this Court was to reinstate the judgment based on a jury verdict because conflicting inferences could be

drawn from the undisputed facts in determining whether the decedent was a seaman and member of the crew.

Obviously the same reasoning holds true in the instant case. It is peculiarly within the province of the trier of fact to determine whether the sales of standing timber by the partnership to the corporation—the sole vendee—constituted property held primarily for sale to "customers" in the ordinary course of the trade or business of the partnership.

The position of petitioners is, as previously stated, that this question, being a non-controversial issue in the manner in which the case was tried in the District Court, was actually determined under the jury verdict under Defendant's Requested Instruction No. 4, establishing the amount of long term capital gain on sales of timber.

However, even under the novel theory of the extended opinion of the Court of Appeals that the jury verdict gathered "efficacy" from the consistent finding of fact of the District Court that the timber was not held primarily for sale to customers in the ordinary course of the trade or business of the partnership, the appellate court did not enjoy complete freedom to substitute its judgment for the trier of fact. Had the court applied the same rule to timber sales as it did to realty sales, the judgment of the District Court whether based on the jury verdict or the findings of fact of the court would have been affirmed under the rule stated in the first opinion to be:

> "It has been uniformly held that the question of particular property held primarily for sale to customers in the ordinary course of business is essentially a question of fact to be determined by the trier of fact. Gamble v. Commissioner, supra; Jackson v.

King, 223 F.2d 714 (5th Cir., 1955); Galena Oaks Corp. v. Scofield, supra."

First Opinion, Appendix, p. 46.

Treating the decision as that of the District Court under the theory of the Court of Appeals, the Court of Appeals could not substitute its judgment for that of the trier of fact where the evidence though undisputed was subject to reasonable conflicting inferences. There is respectable authority to the effect that sales of property to a single vendee do not as a matter of law, constitute sales of property held primarily for sale to customers in the ordinary course of the trade or business of the taxpayer. *Estate of M. M. Stark* v. *Commissioner, supra; Peebles* v. *Commissioner, supra; Camp Mfg. Co.* v. *Comm'r, supra.* In any event it is a matter for the trier of fact to decide from the conflicting inferences which may be drawn from the fact that only one vendee instead of "customers" is involved. See *Jantzer* v. *Commissioner, supra.*

CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

AL. G. RIVES,
ERLE PETTUS, JR.,
Counsel for Petitioners.

RIVES, PETERSON, PETTUS & CONWAY,
Of Counsel.

CERTIFICATE OF SERVICE.

I hereby certify that copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been mailed in a United States Post Office or mail box with first class postage prepaid, addressed to the Hon. Archibald Cox, Solicitor General, Department of Justice, Washington 25, D.C., and the Hon. Louis F. Oberdorfer, Assistant Attorney General, Department of Justice, Washington 25, D.C., this the day of September, 1962.

ERLE PETTUS, JR.,
As Counsel for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 439

W. A. BELCHER, NELL VANDERGRIFT BELCHER, JAMES R. ABERNATHY, JR., and MARY BELCHER ABERNATHY,
Petitioners,

vs.

GEORGE D. PATTERSON, DISTRICT DIRECTOR OF INTERNAL REVENUE,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AL. G. RIVES,
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INDEX TO APPENDIX

United States District Court for the Northern District of Alabama—

Pre-Trial Order	2
Jury Verdict on Special Interrogatories	6
Findings of Fact, Conclusions of Law and Order	12
Judgments	22

United States Court of Appeals for the Fifth Circuit—

First Opinion	29
Judgment	47
Extended Opinion on Petition for Rehearing	49
Order Denying Petition for Rehearing	52
Order Staying Issuance of Mandate	53

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

W. A. BELCHER and NELL VANDERGRIFT BELCHER,
Plaintiffs,
vs.
GEORGE D. PATTERSON, District Director of Internal Revenue,
Defendant.

Civil Action No. 9529

JAMES R. ABERNATHY, JR., and MARY BELCHER ABERNATHY,
Plaintiffs,
vs.
GEORGE D. PATTERSON, District Director of Internal Revenue,
Defendant.

Civil Action No. 9530

W. A. BELCHER, JR., and NELL VANDERGRIFT BELCHER, Trustee,
Plaintiffs,
vs.
GEORGE D. PATTERSON, District Director of Internal Revenue,
Defendant.

Civil Action No. 9531

KATHERINE ANN BELCHER and NELL VANDERGRIFT BELCHER, Trustee,
Plaintiffs,
vs.
GEORGE D. PATTERSON, District Director of Internal Revenue,
Defendant.

Civil Action No. 9532

VAN ELAM BELCHER and MRS. NELL VANDERGRIFT BELCHER, Trustee, Plaintiffs, vs. GEORGE D. PATTERSON, District Director of Internal Revenue, Defendant.	**Civil Action No. 9533**
W. A. BELCHER LUMBER COMPANY, INC., a Corporation, Plaintiff, vs. GEORGE D. PATTERSON, District Director of Internal Revenue, Defendant.	**Civil Action No. 9534**
JAMES R. ABERNATHY, JR., and MARY BELCHER ABERNATHY, Plaintiffs, vs. GEORGE D. PATTERSON, District Director of Internal Revenue, Defendant.	**Civil Action No. 9640**

Filed July 19, 1960.

ORDER ON RETRIAL HEARING

The above cases coming on to be heard on a regular pretrial hearing and all parties being present in person or by counsel; the following action was thereupon taken:

1. The pleadings in each case consist of the complaint and the answer.

2. It is stipulated that the issues to be tried in each case may be submitted to the jury upon special interrogatories substantially in the following form:

No. 9529

(1) What do you find to have been the fair market value of timber sold by Belcher Land and Timber Company to W. A. Belcher Lumber Company, Inc., during the year 1950? $.....

(2) What do you find to have been the fair market value of timber sold by Belcher Land and Timber Company to W. A. Belcher Lumber Company, Inc., during the year 1951? $.....

(3) What do you find to have been the fair market value of such sales of timber held for more than six months during the year 1950? $.....

(4) What do you find to have been the fair market value of such sales of timber held for more than six months during the year 1951? $.....

(5) Was the "Allendale" tract held primarily for sale to customers in the ordinary course of trade or business of the partnership during the year 1950? during the year 1951? during the year 1952? during the year 1954? during the year 1955?

(6) What do you find to have been the proper allowance chart for depletion for the year 1950 on sales by the partnership of timber held for more than six months?

(7) What do you find to have been the proper allowance for depletion for the year 1951 on sales by the partnership of timber held for more than six months? $.....

(8) What do you find to have been the proper allowance for depletion for the year 1950 on sales by the partnership of timber held less than six months? $.....

(9) What do you find to have been the proper allowance for depletion for the year 1951 on sales by

the partnership of timber held less than six months? $ .....

(10) Did the amount expended by the partnership for reforestation during the year 1950 constitute a capital expenditure or an ordinary and necessary business expense? (Underscore in your answer one or the other).

(11) Did the amount expended by the partnership for reforestation during the year 1951 constitute a capital expenditure or an ordinary and necessary business expense? (Underscore in your answer one or the other).

It is stipulated that the response of the jury to the foregoing interrogatories may form the basis of the judgment of the court in cases Nos. 9530, 9531, 9532, and 9533.

No. 9640

It is stipulated that the issues in this case may be submitted to the jury on special interrogatories similar to those above adapted to the years 1952, 1954 and 1955. The following additional special interrogatories will be submitted to the jury:

(A) During the year 1952 was the partnership entitled to claim a deduction for a casualty loss by fire? Answer yes or no. ..... If your answer is in the affirmative, what do you find to have been the amount of the allowable deduction? $ .....

(B) What do you find to have been the cost basis to the partnership of the four acres known as "Crawford" sold for $10,000.00 in the year 1952? $ .....

(C) Was the property referred to in the evidence as Payne sales from the Crawford tract held primarily for sale to customers in the ordinary course of trade or business of the partnership during the years 1954 and 1955?

(D) What do you find to have been the cost basis of the property known as the Payne sales from the Crawford tract? $ .....

The issues in this case relating to expenditures for reforestation and depletion allowance for the years 1954 and 1955 will be submitted on interrogatories substantially similar to those above. Plaintiff will submit a requested interrogatory relating to the cost basis to be applied to the sale of the Allendale property during the year 1955.

No. 9534

The following interrogatories will be submitted:

(A) What do you find to have been the fair market value of the timber sold by the partnership to the corporation for the corporation's taxable year ended June 30, 1951? $ .....

(B) What do you find to have been the fair market value of the timber sold by the partnership to the corporation for the corporation's taxable year ended June 30, 1952? $ .....

(C) What do you find to have been the allowable deduction for depreciation for the taxable year ended June 30, 1951? $ .....

(D) What do you find to have been the allowable deduction for depreciation for the taxable year ended June 30, 1952? $ .....

It is stipulated that these cases may be consolidated for the purpose of trial only and counsel for the parties have agreed to limit permissible peremptory challenges to ten to the side.

It is therefore ORDERED by the court that all of the above-named allowances and agreements be and the same

are hereby binding upon all parties in these cases unless this order be hereafter modified by order of the court.

Done, this the 18th day of July, 1960.

/s/ Seybourn H. Lynne
Judge

Interrogatory No. 1

Filed September 30, 1960.

Taxpayers' Value	$369,432.27
Government's Value	340,727.29

What do you find to have been the fair market value of timber sold by Belcher Land and Timber Company to W. A. Belcher Lumber Company, Inc. during the year 1950?
$369,432.27.

Foster F. Oliver
Foreman

Interrogatory No. 2

Filed September 30, 1960.

Taxpayer's Value	$522,895.53.
Government's Value	416,029.41

What do you find to have been the fair market value of timber sold by Belcher Land and Timber Company to W. A. Belcher Lumber Company, Inc. during the year 1951?
$522,895.53.

Foster F. Oliver
Foreman

Interrogatory No. 3

Filed September 30, 1960.

Taxpayer's Value	$324,626.81
Government's Value	286,332.61

What do you find to have been the fair market value of such sales of timber held for more than six months during the year 1950?

$314,000.00.

Foster F. Oliver
Foreman

Interrogatory No. 4

Filed September 30, 1960.

Taxpayer's Value	$508,226.96
Government's Value	319,680.70

What do you find to have been the fair market value of such sales of timber held for more than six months during the year 1951?

$461,000.00.

Foster F. Oliver
Foreman

Interrogatory No. 5

Filed September 30, 1960.

Taxpayer's Value	$495,257.06
Government's Value	398,046.07

What do you find to have been the fair market value of timber sold by Belcher Land and Timber Company to W. A. Belcher Lumber Company, Inc., during the year 1952?

$495,257.06.

Foster F. Oliver
Foreman

Interrogatory No. 6

Filed September 30, 1960.

Taxpayer's Value	$512,222.71
Government's Value	449,965.60

What do you find to have been the fair market value of timber sold by Belcher Land and Timber Company to W. A. Belcher Lumber Company, Inc., during the year 1955?

$512,222.71.

Foster F. Oliver
Foreman

Interrogatory No. 7

Filed September 30, 1960.

Taxpayer's Value	$475,648.29
Government's Value	318,547.42

What do you find to have been the fair market value of such sales of timber held for more than six months during the year 1952?

$435,000.00.

Foster F. Oliver
Foreman

Interrogatory No. 8

Filed September 30, 1960.

Taxpayer's Value	$161,960.59
Government's Value	251,018.94

What do you find to have been the fair market value of such sales of timber held for more than six months during the year 1955?

$183,000.00.

Foster F. Oliver
Foreman

Interrogatory No. 9

Filed September 30, 1960.

Taxpayer's Value	$495,065.67
Government's Value	409,998.62

What do you find to have been the fair market value of the timber sold by the partnership to the corporation for the corporation's taxable year ended June 30, 1951?
$495,065.67.

Foster F. Oliver
Foreman

Interrogatory No. 10

Filed September 30, 1960.

Taxpayer's Value	$530,187.82
Government's Value	415,654.48

What do you find to have been the fair market value of the timber sold by the partnership to the corporation for the corporation's taxable year ended June 30, 1952?
$530,187.82.

Foster F. Oliver.
Foreman

Interrogatory No. 11

Filed September 30, 1960.

Was the "Allendale" tract held primarily for sale to customers in the ordinary course of trade or business of the partnership:

During the year 1950?	No.	(Yes or No)
During the year 1951?	No.	(Yes or No)
During the year 1952?	No.	(Yes or No)

During the year 1954? Yes. (Yes or No)
During the year 1955? Yes. (Yes or No)

Foster F. Oliver
Foreman

Interrogatory No. 12

Filed September 30, 1960.

Was the property referred to in the evidence as Payne sales from the Crawford tract held primarily for sale to customers in the ordinary course of trade or business of the partnership:

During the year 1954? No. (Yes or No)
During the year 1955? No. (Yes or No)

Foster F. Oliver
Foreman

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

Filed October 11, 1960.

W. A. BELCHER and NELL VANDERGRIFT BELCHER, Plaintiffs, vs. GEORGE D. PATTERSON, District Director of Internal Revenue, Defendant.	**Civil Action No. 9529**
JAMES R. ABERNATHY, JR., and MARY BELCHER ABERNATHY, Plaintiffs, vs. GEORGE D. PATTERSON, District Director of Internal Revenue, Defendant.	**Civil Action No. 9530**
W. A. BELCHER, JR., and NELL VANDERGRIFT BELCHER, Trustee, Plaintiffs, vs. GEORGE D. PATTERSON, District Director of Internal Revenue, Defendant.	**Civil Action No. 9531**
KATHERINE ANN BELCHER and NELL VANDERGRIFT BELCHER, Trustee, Plaintiffs, vs. GEORGE D. PATTERSON, District Director of Internal Revenue, Defendant.	**Civil Action No. 9532**

VAN ELAM BELCHER and NELL VANDERGRIFT BELCHER, Trustee, Plaintiffs, vs. GEORGE D. PATTERSON, District Director of Internal Revenue, Defendant.	**Civil Action No. 9533**
W. A. BELCHER LUMBER COMPANY, INC., a Corporation, Plaintiff, vs. GEORGE D. PATTERSON, District Director of Internal Revenue, Defendant.	**Civil Action No. 9534**
JAMES R. ABERNATHY, JR., and MARY BELCHER ABERNATHY, Plaintiffs, vs. GEORGE D. PATTERSON, District Director of Internal Revenue, Defendant.	**Civil Action No. 9640**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-styled consolidated actions came on to be heard on the 23rd day of September, 1960. Pursuant to the provisions of the order on pretrial hearing entered therein on July 18, 1960, certain special interrogatories were submitted to the jury. Such special interrogatories, together with the responses of the jury thereto, appear serially below:

Interrogatory No. 1

Taxpayers' Value	$369,432.27
Government's Value	340,727.29

What do you find to have been the fair market value of timber sold by Belcher Land and Timber Company to W. A. Belcher Lumber Company, Inc., during the year 1950?

To which the jury responded: $369,432.27.

Interrogatory No. 2

Taxpayer's. Value	$522,895.53
Government's Value	416,029.41

What do you find to have been the fair market value of timber sold by Belcher Land and Timber Company to W. A. Belcher Lumber Company, Inc., during the year 1951?

To which the jury responded: $522,895.53.

Interrogatory No. 3

Taxpayer's Value	$324,636.81
Government's Value	286,332.61

What do you find to have been the fair market value of such sales of timber held for more than six months during the year 1950?

To which the jury responded: $314,000.00.

Interrogatory No. 4

Taxpayer's Value	$508,226.96
Government's Value	319,689.70

What do you find to have been the fair market value of such sales of timber held for more than six months during the year 1951?

To which the jury responded: $461,000.00.

Interrogatory No. 5

Taxpayer's Value	$495,257.06
Government's Value	398,046.07

What do you find to have been the fair market value of timber sold by Belcher Land and Timber Company to W. A. Belcher Lumber Company, Inc., during the year 1952?

To which the jury responded: $495,257.06.

Interrogatory No. 6

Taxpayer's Value	$512,222.71
Government's Value	449,965.69

What do you find to have been the fair market value of timber sold by Belcher Land and Timber Company to W. A. Belcher Lumber Company, Inc., during the year 1955?

To which the jury responded: $512,222.71.

Interrogatory No. 7

Taxpayer's Value	$475,648.29
Government's Value	318,547.42

What do you find to have been the fair market value of such sales of timber held for more than six months during the year 1952?

To which the jury responded: $435,000.00.

Interrogatory No. 8

Taxpayer's Value	$161,960.59
Government's Value	251,018.94

What do you find to have been the fair market value of such sales of timber held for more than six months during the year 1955?

To which the jury responded: $183,000.00.

Interrogatory No. 9

Taxpayer's Value	$495,065.67
Government's Value	409,998.62

What do you find to have been the fair market value of the timber sold by the partnership to the corporation for the corporation's taxable year ended June 30, 1951?

To which the jury responded: $495,065.67.

Interrogatory No. 10

Taxpayer's Value	$530,187.82
Government's Value	415,654.48

What do you find to have been the fair market value of the timber sold by the partnership to the corporation for the corporation's taxable year ended June 30, 1952?

To which the jury responded: $530,187.82.

Interrogatory No. 11

Was the "Allendale" tract held primarily for sale to customers in the ordinary course of trade or business of the partnership: During the year 1950? During the year 1951? During the year 1952? During the year 1954? During the year 1955?

To which the jury responded, for the year 1950, no; for the year 1951, no; for the year 1952, no; for the year 1954, yes; and for the year 1955, yes.

Interrogatory No. 12

Was the property referred to in the evidence as Payne sales from the Crawford tract held primarily for sale to customers in the ordinary course of trade or

business of the partnership: During the year 1954? During the year 1955?

To which the jury responded, for the year 1954, no; and, for the year 1955, no.

Counsel, in open court, stipulated that the remaining issues might be heard and decided by the court without the intervention of a jury on the evidence heard in open court in the trial to the jury. The court therefore makes and enters the following findings of fact and conclusions of law upon those issues tried to the court without a jury.

Findings of Fact

1. Belcher Land and Timber Company is a partnership created on August 1, 1946, and at all times subsequent thereto has been a valid and subsisting partnership composed of the following partners with partnership interests as stated:

William Albert Belcher	34%
Nell Vandergrift Belcher	34%
Nell Vandergrift Belcher, as Trustee For:	
Mary Earnestine Belcher Abernathy William Albert Belcher, Jr. Van Elam Belcher Katherine Anne Belcher	32%

The Trustee has made annual distribution to each beneficiary of the trust of partnership income received.

2. W. A. Belcher Lumber Company, Inc., a corporation, commenced operations as of August 1, 1946, and at all times subsequent thereto has been a valid and subsisting corporation. The ownership of stock of the corpora-

tion is held by the same persons and in the same percentage as the partnership interests in the Belcher Land and Timber Company.

3. The amounts expended by the Belcher Land and Timber Company, a partnership, for each of the years 1950, 1951, 1952, 1954 and 1955, for reforestation are not deductible from income but constitute capital expenditures, such amounts for each of such years being as follows:

1950	$ 9,070.00
1951	4,541.25
1952	5,040.00
1954	13,069.40
1955	11,864.20

4. The cost basis of the land sold by the Belcher Land and Timber Company, a partnership, from the tract known as "Crawford" in 1952 is $4,245.00.

5. The cost basis of the land described as "Payne Sales from the Crawford Tract" sold in 1954 by the Belcher Land and Timber Company, a partnership, is $7,575.00.

6. The cost basis of the land described as "Payne Sales from the Crawford Tract" sold in 1955 by the Belcher Land and Timber Company, a partnership, is $6,060.00.

7. The cost basis of the land sold in 1955 from the Allendale Tract by the members of the Belcher Land and Timber Company, a partnership, is as follows:

Dobbins Acreage	
32.345 acres	$ 33,000.00
Belcher Building Corp.	
45.8 acres	$102,550.00

8. The Belcher Land and Timber Company, a partnership, timber depletion allocable to the timber cut in

each of the years 1950, 1951, 1952, 1954 and 1955, inclusive, is that figure for each year computed by commencing with the timber balances shown in the Report of Revenue Agent Crim (Plaintiff's Exhibit 31) as of December 31, 1949, plus growth of timber at the rate of 68 feet per acre per year on fee lands, said depletion for each of the years involving being as follows:

Year	Total Depletion	Depletion Long Term Sales
1950	$152,469.31	$ 97,037.04
1951	329,609.03	267,713.50
1952	273,390.64	213,133.58
1954	211,919.35	105,958.67
1955	455,385.64	124,972.03

9. The sales of timber made for each of the years 1950 to 1955, inclusive, by the Belcher Land and Timber Company, a partnership, to W. A. Belcher Lumber Company, a corporation, were not made of property held primarily for sale to customers in the ordinary course of trade or business of Belcher Land and Timber Company, a partnership.

10. The proper depreciation allowance of W. A. Belcher Lumber Company, Inc., a corporation, is as follows for the fiscal years ended June 30, 1951 and June 30, 1952, with respect to each of the items described below:

F.Y. 6/30/51	Useful Life	Salvage
Moulding Mill, Birmingham	15 yrs.	—
Dry Kiln, Birmingham	20 yrs.	10%
Power Machinery	10 yrs.	—
Drying Sheds	20 yrs.	10%
Broom Handle Plant	15 yrs.	—
Saw Mill	10 yrs.	—

F.Y. 6/30/52	Useful Life	Salvage
Planing Mill, Birmingham	15 yrs.	—
D4 Cat. Tractor (#7W12263)	5 yrs.	5%
New Hydraulic Bulldozer Pump	3 yrs.	—
Moulding Mill, Birmingham	15 yrs.	—
Dry Kiln, Birmingham	20 yrs.	10%
Power Machinery	10 yrs.	—
Drying Sheds	20 yrs.	10%
Broom Handle Plant	15 yrs.	—
Saw Mill	10 yrs.	—
Planing Mill, Birmingham	15 yrs.	—
D4 Cat. Tractor (#7W12263)	5 yrs.	5%
Hydraulic Bulldozer Pump	3 yrs.	—
D4 Cat. Tractor (#7W14391)	5 yrs.	5%
New Cadillac Coupe deVille	4 yrs.	5%

The depreciation for all other depreciable property for said corporation is as shown in the federal income tax returns filed by the corporation for each of said years.

11. The Belcher Land and Timber Company, a partnership, had no cost basis for any timber claimed as a casualty loss by fire in 1952 and such claimed casualty loss is disallowed.

12. For purposes of this case in ascertaining the cost basis of sales of certain parcels from the Allendale Tract in 1955, the re-acquisition of this property (previously sold in 1950 to Atlanta Highway Estates, Inc.), through foreclosure in 1953 and the extinguishment of the statutory right of redemption in 1954 by the quitclaim deed of the equity of redemption, has been considered a taxable event and the court has been apprized of the contention of plaintiffs that the tax consequences of the foreclosure were not effective until the statutory right of redemption was extinguished by the quitclaim deed from Atlanta Highway

Estate, Inc., the mortgagor, to Belcher Land and Timber Company, a partnership, the mortgagee, and the court has been advised of the contrary contention of the defendant that the tax consequences of the foreclosure were fully effective in 1953, and no adjudication is made of this issue except for purposes of this case only in determining the cost basis of the sales from the Allendale tract in 1955 and neither party is hereby estopped or in any wise precluded in any other litigation or proceeding from litigating the issue of the proper year in which any gain from the foreclosure is taxable.

Conclusions of Law

1. The amounts expended by the partnership, Belcher Land and Timber Company, for reforestation constitute capital expenditures as provided by Section 24 of the Internal Revenue Code of 1939 or Section 263 of the Internal Revenue Code of 1954, as the case may be, and such expenditures are not deductible from income under the provisions of Section 23 (a) of the Internal Revenue Code of 1936, or Section 162 of the Internal Revenue Code of 1954.

2. The cost basis of land as found in the findings of fact above is properly determinable under the Internal Revenue Code of 1939 or the Internal Revenue Code of 1954, as the case may be, for determining gain on sales of real estate.

3. In computing the proper allowance for timber depletion, a reasonably ascertainable growth factor should be taken into consideration to arrive at the estimated amount of timber each year subject to the depletion allowance.

4. The sales of timber made by the Belcher Land and Timber Company, a partnership, to the W. A. Belcher Lumber Company, a corporation, during the years 1950, 1951, 1952, 1954 and 1955, of timber held for more than six months are entitled to capital gain treatment under the appropriate provisions of the Internal Revenue Code of 1939 or 1954, as the case may be.

5. Casualty losses are not deductible in excess of the cost basis of the property lost.

Order

In conformity with the responses of the jury to the special interrogatories, as shown above, and with the findings of fact and conclusions of law made and entered by the court upon those issues submitted to the court without the intervention of a jury by stipulation of counsel:

It is ORDERED, ADJUDGED and DECREED by the court that the amount plaintiffs are entitled to recover and/or be refunded, if any, to be entered as the final judgment in these consolidated cases shall be computed by the parties in accordance with the foregoing findings of fact, and the verdict of the jury on the special interrogatories, subject to the approval of the court, and the court hereby retains jurisdiction of the cases for such other orders, judgments and decrees as may be necessary and proper.

Done, this the 10th day of October, 1960.

Seybourn H. Lynne

Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

W. A. BELCHER and NELL VANDERGRIFT BELCHER,
Plaintiffs,
vs.
GEORGE D. PATTERSON, District Director of Internal Revenue,
Defendant.

Civil Action No. 9529

Filed November 23, 1960.

FINAL JUDGMENT

This cause coming on to be heard for entry of final judgment in accordance with the computation made pursuant to the order of Court, dated October 10, 1960, in consolidated actions, including the above styled action.

It is ORDERED, ADJUDGED and DECREED by the Court that plaintiffs have and recover of the defendant the sum of One Hundred Five Thousand Seven Hundred Twenty and 09/100 Dollars ($105,720.09), together with interest as provided by law, and costs.

Done, this the 23rd day of November, 1960.

/s/ Seybourn H. Lynne
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

JAMES R. ABERNATHY, JR., and MARY BELCHER ABERNATHY, Plaintiffs,

vs.

GEORGE D. PATTERSON, District Director of Internal Revenue, Defendant.

Civil Action No. 9530

Filed November 23, 1960.

FINAL JUDGMENT

This cause coming on to be heard for entry of final judgment in accordance with the computation made pursuant to the order of Court, dated October 10, 1960, in consolidated actions, including the above styled action.

It is ORDERED, ADJUDGED and DECREED by the Court that plaintiffs have and recover of the defendant the sum of Three Thousand Seven Hundred Eighty-nine and 76/100 Dollars ($3,789.76), together with interest as provided by law, and costs.

Done, this the 23rd day of November, 1960.

/s/ Seybourn H. Lynne

Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

W. A. BELCHER, JR., and NELL VANDERGRIFT BELCHER, Trustee,
Plaintiffs,
vs.
GEORGE D. PATTERSON, District Director of Internal Revenue,
Defendant.

Civil Action No. 9531

Filed November 23, 1960.

FINAL JUDGMENT

This cause coming on to be heard for entry of final judgment in accordance with the computation made pursuant to the order of Court, dated October 10, 1960, in consolidated actions, including the above styled action.

It is ORDERED, ADJUDGED and DECREED by the Court that plaintiffs have and recover of the defendant the sum of Four Thousand Nine Hundred Thirty and 07/100 Dollars ($4,930.07), together with interest as provided by law, and costs.

Done, this the 23rd day of November, 1960.

/s/ Seybourn H. Lynne
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

KATHERINE ANN BELCHER and NELL VANDERGRIFT BELCHER, Trustee,
Plaintiffs,
vs.
GEORGE D. PATTERSON, District Director of Internal Revenue,
Defendant.

Civil Action No. 9532

Filed November 23, 1960.

FINAL JUDGMENT

This cause coming on to be heard for entry of final judgment in accordance with the computation made pursuant to the order of Court, dated October 10, 1960, in consolidated actions, including the above styled action.

It is ORDERED, ADJUDGED and DECREED by the Court that plaintiffs have and recover of the defendant the sum of Four Thousand Nine Hundred Twenty-nine and 19/100 Dollars ($4,929.19), together with interest as provided by law, and costs.

Done, this the 23rd day of November, 1960.

/s/ Seybourn H. Lynne
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

VAN ELAM BELCHER and NELL VANDERGRIFT BELCHER, Trustee,
Plaintiff,
vs.
GEORGE D. PATTERSON, District Director of Internal Revenue,
Defendant.

Civil Action No. 9533

Filed November 23, 1960.

FINAL JUDGMENT

This cause coming on to be heard for entry of final judgment in accordance with the computation made pursuant to the order of Court, dated October 10, 1960, in consolidated actions, including the above styled action.

It is ORDERED, ADJUDGED and DECREED by the Court that plaintiffs have and recover of the defendant the sum of Four Thousand Nine Hundred Twenty-nine and 64/100 Dollars ($4,959.64), together with interest as provided by law, and costs.

Done, this the 23rd day of November, 1960.

/s/ Seybourn H. Lynne
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

W. A. BELCHER LUMBER COMPANY, INC., a Corporation,
Plaintiff,
vs.
GEORGE D. PATTERSON, District Director of Internal Revenue,
Defendant.

Civil Action No. 9534

Filed November 23, 1960.

FINAL JUDGMENT

This cause coming on to be heard for entry of final judgment in accordance with the computation made pursuant to the order of Court, dated October 10, 1960, in consolidated actions, including the above styled action,

It is ORDERED, ADJUDGED and DECREED by the Court that plaintiff have and recover of the defendant the sum of Sixty-seven Thousand Six Hundred Thirty-two and 74/100 Dollars ($67,732.74), together with interest as provided by law, and costs.

Done, this the 23rd day of November, 1960.

/s/ Seybourn H. Lynne
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

JAMES R. ABERNATHY, JR., and MARY BELCHER ABERNATHY, Plaintiffs,

vs.

GEORGE D. PATTERSON, District Director of Internal Revenue, Defendant.

Civil Action No. 9640

Filed November 23, 1960.

FINAL JUDGMENT

This cause coming on to be heard for entry of final judgment in accordance with the computation made pursuant to the order of Court, dated October 10, 1960, in consolidated actions, including the above styled action.

It is ORDERED, ADJUDGED and DECREED by the Court that plaintiffs have and recover of the defendant the sum of Five Thousand Eighteen and 62/100 Dollars ($5,018.62), together with interest as provided by law, and costs.

Done, this the 23rd day of November, 1960.

/s/ Seybourn H. Lynne

Chief Judge

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18925

GEORGE D. PATTERSON,
District Director of Internal Revenue,
Appellant,

versus

W. A. BELCHER, ET AL.,
Appellees.

JAMES R. ABERNATHY, JR., and
MARY BELCHER ABERNATHY,
Appellants,

versus

GEORGE D. PATTERSON,
District Director of Internal Revenue,
Appellee.

Appeals from the United States District Court
for the Northern District of Alabama.
(April 19, 1962)

Before RIVES and WISDOM, Circuit Judges, and CARSWELL, District Judge.

CARSWELL, District Judge: Seven actions were instituted in the District Court wherein the plaintiffs sought income tax refunds for taxes allegedly overpaid. The Director of Internal Revenue appeals from adverse findings of fact and conclusions of law. In cross appeal filed by

two of the plaintiffs, in one case, there is an attack on the verdict of the jury and upon the refusal of the court to grant directed verdict for the plaintiffs. The questions presented by the Director will be treated in I and II below. The question raised regarding the appeal of James R. Abernathy, Jr., and Mary Belcher Abernathy from the determination of the jury will be discussed in III below.

I

The questions raised by the Director require the Court first to determine whether the issue presented here was preserved by timely presentation to the District Court. If it is held here that the matter was adjudicated in the District Court, the Director further contends that the District Court erred in its holding that the gain realized by the taxpayers as a result of the sales of timbers by the partnership to the corporation in the years 1950, 1951, 1952, 1954 and 1955 was capital gain and not ordinary income.

The Belcher Land and Timber Company, called here the partnership, and the individual members comprising it, sought refunds for taxes which they claim were overpaid.

The partnership was formed on August 1, 1946. The W. A. Belcher Lumber Company, Inc., called here the corporation, also commenced operations as of August 1, 1946. The ownership of the stock in the corporation is held by the same persons and in the same percentage as held by them in the partnership. W. A. Belcher has been the chief executive officer of both the partnership and the corporation since their inception.

In the years 1950 through 1955 the partnership bought and sold real estate and lumber. The following reflects the yearly purchases of timber by the partnership in the years 1950 through 1955:

	Number of Purchases	Footage (Board Feet)
1950	16	5,838,194
1951	25	10,555,212
1952	49	4,779,899
1953	59	8,895,923
1954	46	20,611,667
1955	42	16,349,296

The corporation purchased timber from the partnership and manufactured it into lumber.

The timber was cut by the corporation pursuant to a loose oral arrangement or understanding between the partnership and the corporation. This arrangement was in the nature of a continuing offer by the partnership for the sale of its timber. The corporation accepted these continuing offers as a matter of course and cut the timber from the land owned or leased by the partnership. The partnership received payment from the corporation measured by the fair market value of the timber cut. The following reflects the partnership sales to the corporation for the years 1950 through 1955:

	Price Paid by Corporation	Footage (Board Feet)
1950	$369,432.27	15.4 million
1951	522,895.53	15.1 million
1952	495,257.06	14.4 million
1953	419,411.36	16.1 million
1954	252,678.20	12.2 million
1955	512,222.71	16.5 million
Total	$2,152,485.77	

In addition to the sales made to the corporation, the partnership made sales to other customers as follows:

	Timber Held by Partnership for More Than 6 Mos.	Timber Held by Partnership for Less than 6 Mos.
1950	$ 2,148.45	$ —0—
1951	2,196.69	—0—
1952	3,552.32	—0—
1953	—0—	—0—
1954	—0—	7,735.00
1955	13,680.00	2,739.05
Total	$21,577.46	$10,474.05

In its tax returns for the years 1950 through 1955 the partnership accorded the gain from the sales of timber capital gain treatment. The individual members of the partnership treated their respective distributive shares of the gain from sales of timber in their individual tax returns as capital gains. The timber sold by the partnership was partly timber which stood on lands owned by the partnership and was partly timber standing on land owned by others on which the partnership had a lease or contractual right to cut.

The partnership returns were audited by the Internal Revenue Service and a finding made of deficiencies in taxes for each of the partners for all of the years 1950 through 1955, inclusive. The year 1953 is the subject matter of pending litigation in the Tax Court and is not involved here. The partners paid the assessed deficiencies and filed claims for refund. Upon rejection of these claims, the instant actions were filed and consolidated for trial.

On September 22, 1960, prior to the trial, the Director filed a motion for set-off, urging that neither the partner-

ship nor the individual partners were entitled to capital gain treatment on the partnership sales of timber because: (1) the partnership was engaged, among other things, in the business of selling logs and timber to customers in the ordinary course of its trade or business; (2) the agents of the Internal Revenue Service incorrectly assumed that the sales of timber held by the partnership constituted gain from the sale of a captial asset held for more than six months under the provisions of Section 117(k)(2) of the 1939 Internal Revenue Code and Section 631(b) of the 1954 Code. The Director discovered that there was not a "disposal of timber" with retained economic interest as required in these sections, and, in addition, found that some of the logs and timber sold was not held, as required, for more than six months prior to disposal. (3) Neither the partners nor the partnership elected to come under the provisions of Section 117 (k)(1) of the 1939 Code or Section 631(a) of the 1954 Code. Therefore, the Director says, the timber held by the partnership was its stock in trade, so to speak, and was, accordingly, held primarily for sale to customers in the ordinary course of its trade or business. If this be so, it follows that the gain from these sales of timber should have been reported and taxed as ordinary income rather than capital gain.

The partnership contends that the issue of whether the timber held by the partnership was held primarily for sale to customers in the ordinary course of its trade or business was not raised in the court below and, therefore, is not properly before this Court for determination on appeal.

The partnership's position is that the instruction given by the court to the jury at the request of the Director is

the law of the case[1]; that the pre-trial order as well as the testimony of the witnesses show that this issue had not been previously raised and the attempt by the Director to raise the issue on this appeal is improper. It contends that the Revenue Agent's report on which claim for refund is predicated failed to raise this issue and this report being presumptively correct, the Director is precluded from raising the issue.

In its findings of fact, however, the District Court specifically found that the sales of timber made for each of the years 1950 through 1955 by the partnership to the corporation were *not* made of property held primarily for sale to customers in the ordinary course of the trade or business of the partnership. In its conclusions of law the court held that the gain from sales of timber made by the partnership to the corporation during each of the five years involved here were entitled to capital gain treatment under the Internal Revenue Code.

By agreement of the parties only a few of the many factual issues presented were submitted to the jury, all others being left to the trial court for determination. Since

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1. *Defendant's Requested Instruction No. 4*

"* * * You will notice from the questions I am going to hand to you to take into the jury room that you are asked to determine the fair market value of timber held for six months or less and for timber held for more than six months. This separation is important because the tax treatment is different. Timber held for more than six months is subject to the capital gains tax while timber held for six months or less before the cutting date is subject to ordinary income tax rates. Therefore your answers will separate the two for each of the years in question. This means that you must first determine which timber was held for more than six months before cutting and which was held for six months or less. After separating the two, you must determine the fair market value of each upon the cutting date."

the court found that the sales were not made of property held primarily for sale to customers in the ordinary course of trade or business, the subsequent interrogatories submitted to the jury distinguishing long term gains from short term gains necessarily followed. We hold that the issue was properly raised and adjudicated below and is, therefore, properly before this Court.

The Director urges that the finding of fact made by the District Court was erroneous. Since there is no basic disagreement as to the evidentiary facts, the Director's objections to the finding may be weighed here free from the restraint of the "clearly erroneous rule" to determine whether the District Court erred in its ultimate finding of fact that the sales of timber made by the partnership were not made of property held primarily for sale to customers in the ordinary course of trade or business. *Thomas v. Commissioner*, 254 F.2d 233 (5th Cir. 1958); *Gamble v. Commissioner*, 242 F.2d 586 (5th Cir. 1957); *Galena Oaks Corp. v. Scofield*, 218 F.2d 217 (5th Cir. 1954).

Gains from the sale of timber constitute capital gain and are given favorable capital gain treatment if the timber is a "capital asset" as defined by Section 117(a)(1) and (4) of the 1939 Code[2]; or if the transactions whereby the gain

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2. Sec. 117. CAPITAL GAINS AND LOSSES.

(a) Definitions.—As used in this chapter—

(1) Capital Asset.—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(A) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

(4) Long-term capital gain.—The term "long term capital gain" means gain from the sale or exchange of a capital

Section 117(a)(1) defines "capital assets" as property held by the taxpayer (whether or not connected with his trade or business), but does not include . . . property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business; . . ."

Section 117(k)(1) provides that the actual cutting of timber by a taxpayer who owns or has a contractual right to cut shall be considered, *if the taxpayer so elects*, as a sale or exchange of the timber and the gain resulting therefrom shall be given capital gain treatment. We find that Section is realized comply with the specific terms of Section 117(k)(1) or (2)[3].

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asset held for more than 6 months, if and to the extent such gain is taken into account in computing gross income; . . .

3. (k) (As added by Sec. 127(a), Revenue Act of 1943, *supra*, and as amended by Sec. 325(b) and (c), Revenue Act of 1951, *supra*). Gain or loss in the Case of Timber or Coal.—

(1) If the taxpayer so elects upon his return for a taxable year, the cutting of timber (for sale or for use in the taxpayer's trade or business) during such year by the taxpoyer who owns, or has a contract right to cut, such timber (providing he has owned such timber or has held such contract right for a period of more than six months prior to the beginning of such year) shall be considered as a sale or exchange of such timber cut during such year. . . .

(2) In the case of the disposal of timber or coal (including lignite), held for more than 6 months prior to such disposal, by the owner thereof under any form or type of contract by virtue of which the owner retains an economic interest in such timber or coal, the difference between the amount received for such timber or coal and the adjusted depletion basis thereof shall be considered as though it were a gain or loss, as the case may be, upon the sale of such timber or coal. . . .

Sec. 631. Internal Revenue Code of 1954. GAIN OR LOSS IN THE CASE OF TIMBER OR COAL.

(a) Election to Consider Cutting as Sale or Exchange.— If the taxpayer so elects on his return for a taxable year, the cutting of timber (for sale or for use in the taxpayer's trade

117(k)(2) is inapplicable here since there was no "disposal" of timber under a "contract by virtue of which the owner retains an economic interest in such timber." See *Jantzer v. Commissioner*, 284 F.2d 348 (9th Cir. 1960). The appellees assert no rights under Sections 117(k)(1) or 117(k)(2), therefore no discussion is deemed necessary.

The evidence of record establishes that the partnership was primarily in the business of selling timber. W. A. Belcher, the chief executive officer of the partnership and the corporation, testified to this fact.[4]

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or business) during such year by the taxpayer who owns, or has a contract right to cut, such timber (providing he has owned such timber or has held such contract right for a period of more than 6 months before the beginning of such year) shall be considered as a sale or exchange of such timber cut during such year. . . .

(b) Disposal of Timber With a Retained Economic Interest.—In the case of the disposal of timber held for more than 6 months before such disposal, by the owner thereof under any form or type of contract by virtue of which such owner retains an economic interest in such timber, the difference between the amount realized from the disposal of such timber and the adjusted depletion basis thereof, shall be considered as though it were a gain or loss, as the case may be, on the sale of such timber . . . For purposes of this subsection, the term "owner" means any person who owns an interest in such timber, including a sublessor or a holder of a contract to cut timber.

4. *Cross-Examination:*

Q. (By Mr. Frazier) Mr. Belcher, I believe you testified a moment ago that you are a lumber manufacturer. You have got several other businesses, too?
A. Yes, I have got a few other things.
Q. You are the President of the Land & Timber Company, aren't you?
A. President.
Q. President?
A. I am joint owner and manager.
Q. Of the land and timber company?
A. Right.
Q. You are the chief executive office?

In the partnership Form 1065 tax returns for each of the years in question, it is asserted that the principal activity of the partnership was "real estate and timber". The partnership's ledgers (Plaintiff's Exhibit 11) reveals a long history of constant, continuous and substantial timber sales throughout the years 1950 through 1955.

Under the headings set forth in the ledgers one section is devoted to the sales of timber made to the corporation and the other to sales made to other customers.

The partnership sold over 80 million board feet of timber to the corporation in the six year period. The sales ranged from a minimum of something under 9 million board feet in the year 1953 to a maximum of 19 million board feet in the year 1954. The sales were numerous and the ledger shows that the partnership billed the corporation for timber sold as frequently as bi-monthly. In the six year period the partnership received a total of $2,152,485.77. Although not in so great a quantity, there were sales to other customers. During the six year period in question, the partnership received total income in sales to other customers in the amount of $32,051.51.

The partnership made continuous, numerous and frequent purchases of standing timber. These purchases consisted of both land purchases as well as lease or contract

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A. I am General Manager.
Q. About the corporation, the lumber company?
A. I am President.
Q. That is the same office generally as Chief Executive. Now what is the land and timber company? It, as I understand it buys the land and timber and turns around and sells it to the corporation?
A. To the lumber company.
Q. And the lumber company cuts it up into boards and pays what you consider to be the fair market value?
A. Right.

rights to cut timber standing on land belonging to others. A total of 237 separate standing timber purchases were made from 1950 through 1955, ranging from a minimum of 16 purchases in any one year to a maximum of 59 purchases. In addition to the timber which it already owned, the partnership acquired as a result of these purchases approximately 65 million board feet of standing timber over the six year period. Virtually all of the timber was cut within one year after it had been acquired. All of the timber was cut by the partnership's customers. Of the timber held in excess of six months the partnership netted $861,467.22.

On the basis of the foregoing facts, if the sales of timber made by the partnership did not consist of timber held primarily for sale to customers in the ordinary course of trade or business, it is difficult to conceive for what other purpose the timber was held. The fact that most of the timber was sold to the corporation does not alter the fact that the primary business of the partnership was selling timber. There is nothing in the statute to provide that sales to a restricted number of customers are not to be considered as sales to customers. *Pennroad Corp.* v. *Commissioner*, 261 F.2d 325 (3rd Cir. 1958), certiorari denied 359 U.S. 958. A single vendee may be a customer within the meaning of Section 117(a)(1). *Jantzer* v. *Commissioner*, *supra*.

We, therefore, hold that the District Court erred in its ultimate determination that the sale of timber for the years in question were not of property held primarily for sale to customers in the ordinary course of trade or business. It therefore follows that we do not agree that the sales of timber constituted sales of "capital assets" under Section 117(1).

The judgment is therefore vacated and the cause remanded to the District Court with directions for the entry of judgment in accordance herewith.

II

The second question raised in the Director's appeal is whether the District Court erred in refusing to make a determination of the specific year in which the Allendale tract of land became a taxable event to the partnership.

In 1950 the partnership sold the bulk of a property known as the Allendale tract to the Atlanta Highway Estates, Inc. The total price of the property sold by the partnership was $727,200. The vendee paid $53,236 in cash and gave a purchase money mortgage for the remaining balance of $673,964. In 1953 as a result of the default by Atlanta Highway Estates, Inc., the partnership foreclosed on the mortgaged property. At public auction on February 14, 1953, the partnership bid in the property at $500,000 and on that date reacquired the property through deed of foreclosure.

Beginning in January, 1954, and continuing through 1955 the partnership resold the repossessed property in small parcels and lots. Although the gain upon the foreclosure was not reported by the partnership, the partnership increased the cost basis of the property by the amount of the price bid in at the foreclosure. It thereby subsequently computed its gain on the sales of the small parcels and lots using the increased basis of the property. As a result thereof it reported a smaller gain from the sale of these parcels and lots.

The Director determined in its notice of deficiency that the gain realized on the foreclosure sale should have been reported in the partnership income for the year 1953. Income tax adjustments for the year 1953 are now in the Tax Court upon petition for redetermination filed by the taxpayer.

The District Court during the course of the trial ruled that the gain realized from the foreclosure sale was a tax-

able event, but there was no ruling as to the taxable year. At the close of the trial the Director discovered that the taxpayers were urging in the Tax Court that the foreclosure sale was a taxable event in 1954 or 1955 on the ground that the two year statutory right of redemption was not relinquished until July 26, 1954. Upon discovery of the fact that the taxpayers denied that the foreclosure was a taxable event in 1953, the Director moved the District Court to determine the specific year that the gain on the foreclosure sale constituted a taxable event. The District Court declined to do so, stating as grounds for its refusal that "neither party is hereby estopped or in any wise precluded in any other litigation or proceeding from litigating the issue of the proper year in which any gain from the foreclosure is taxable."

We think that the District Court's refusal to make a determination of the specific year in which the gain constituted a taxable event was error, for in order for there to be a final disposition of this litigation such determination is indispensable. The taxable consequences of this determination should likewise be settled in this litigation.

The taxpayer is not entitled to a refund for the years in which he claims such refunds are due if he still owes taxes for the years involved. The Director is entitled to set off any monies still owing to the Government against the amounts claimed for refund. See *Lewis* v. *Reynolds*, 48 F. 2d 515 (10th Cir. 1931), affirmed 284 U.S. 281.

Once the year of the taxable event is established, the taxable consequences follow as a matter of course. If the gain from the foreclosure is a taxable event of the year 1953, then the Director would have no right of set-off in *this* litigation as distinguished from other claims for refund asserted by the taxpayer in the Tax Court. If the gain is a taxable event in the year 1954 or 1955, the partners or part-

nership would not be entitled to as much of a refund as they now lay claim to. A new suit should not be required merely for the purpose of making this determination.

A plenary proceeding involving the same testimony, the same exhibits, the same parties and the same subject matter is a useless procedure and can only increase the costs of litigation and prolong the matter unduly. We think that the District Court should make this determination from the record as it stands, or if either of the parties desire to submit additional relevant evidence the District Court should receive it and thereafter enter appropriate findings of fact and conclusions of law.

Reversed and remanded with directions for further proceedings in accordance herewith.

III

This portion of the opinion is devoted to the appeal of Mary Belcher Abernathy and James R. Abernathy, Jr. They contend that the District Court erred in refusing to grant a directed verdict on the question of whether the Allendale tract was held primarily for sale to customers in the ordinary course of trade or business for the years 1954 and 1955.

The jury found that the Allendale tract was held primarily for sale to customers in the ordinary course of trade or business in 1954 and 1955. We must, therefore, determine the sufficiency of the evidence to support the verdict. The jury answered a special interrogatory as follows:

> "Was the 'Allendale' tract held primarily for sale to customers in the ordinary course of trade or business of the partnership:
>
> During the year 1950? — No — (Yes or No)
> During the year 1951? — No — (Yes or No)

During the year 1952? — No — (Yes or No)
During the year 1954? — Yes — (Yes or No)
During the year 1955? — Yes — (Yes or No)"

In 1943 Mary Belcher Abernathy, here referred to as the taxpayer, was a partner along with other members of the Belcher family in the W. A. Belcher Lumber Company.

In 1943 the partnership purchased a 699.47 acre tract of land known as the Allendale tract. At the time the purchase was made, part of the property had been subdivided and streets and utilities were installed but not all of the lots had been sold. The W. A. Belcher Lumber Company sold lots from the Allendale tract through a real estate man at Fairfield.

On August 1, 1946, the W. A. Belcher Lumber Company was dissolved and the Belcher Land and Timber Company, a partnership, was formed. The Allendale tract along with other assets of the W. A. Belcher Lumber Company was transferred to the new partnership. At this time the Allendale property was reduced to 691.476 acres.

The partnership thereafter conducted the sales of the lots. The partnership returns show that the partnership made sales from the Allendale tract (excluding the installment sale to the Atlanta Highway Estates in 1950, referred to in II, supra) in the number of sales, acreage, gross sales price and total gain in the years 1946 through 1955 as listed below:

	Number of Sales	*Acres Sold*	*Gross Sales Price*	*Total Gain*
1946	1	—	$ 53,490.00	$ 6,455.56
1947	0	—	—	—
1948	2	13.5 and a lot 200' x 300'	10,750.00	3,200.00
1949	2	21.59	15,590.00	6,686.00

1950	3	27.756	87,024.00	73,970.00
1951	2	7.1074	28,420.00	24,155.50
1952	1	—	1,000.00	2,500.00
1953	1	—	31,800.00	27,030.00
1954	9	—	41,510.00	10,760.00
1955	5	—	257,090.50	57,470.50

In its returns for these years the partnership treated the gain from the above sales as long term capital gain. The individual taxpayers treated their respective distributive shares from the sale of Allendale property as long term capital gains.

The partnership's returns show that on July 15, 1950, the partnership sold 581.76 acres of the Allendale tract to the Atlanta Highway Estates, Inc., for $727,200 and for the three years prior to default the total collections, including the down payment, totaled $124,439.95. Of these collections $106,831.71 was reported as profit and the balance, $17,608.24, was treated as a return of capital.

In 1953 when the partnership foreclosed on 445.46 acres of the Allendale tract, the partnership bid in the property at $500,000 and acquired deed thereto. On July 26, 1954, the Atlanta Highway Estates, Inc., relinquished its statutory right of redemption by quit claim deed. All of the sales from the Allendale tract listed by the partnership in its returns for the years 1954 and 1955 were from the repossessed property.

Some of the sales from the Allendale tract were to Belcher Building Corporation. This corporation was formed in 1946 to develop land, to build houses for sale, and to otherwise deal in real estate. At the outset W. A. Belcher and one W. E. Armstrong each owned one-third of the stock and E. C. Creel and the Creel Investment Company, Inc., owned the remaining one-third.

In 1954 W. A. Belcher and Nell Vandergrift Belcher, his wife, acquired all of the stock formerly held by Armstrong, Creel and Creel Investment Company, and thereby acquired complete ownership of the Belcher Building Corporation. A qualifying share thereafter issued to Mrs. N. O. Vandergrift. W. A. Belcher, Nell Vandergrift Belcher and Mrs. N. O. Vandergrift became the Board of Directors. The Belcher Building Corporation never profited.

The General Manager of the Belcher Building Corporation testified that he knew he was working solely for Mr. Belcher in the years 1954 and 1955. In these years he developed and subdivided raw acreage from the repossessed Allendale tract for resale through the Belcher Building Corporation. The acreage was actually purchased by the Building Corporation in 1955, but the planning and developing began in 1954. In the years 1954 and 1955 lots from the Allendale tract were sold directly to the public on behalf of the partnership.

The Director in the deficiency notice determined that the lots in the Allendale tract were held primarily for sale to customers in the ordinary course of trade or business of the partnership, and that the profit realized on sales from the property on that tract was ordinary income rather than long term capital gain as reported on the partnership return. Assessments of the deficiencies for the years 1950, 1951, 1952, 1954 and 1955 were timely made.

5.

	Net Sales	*Net Income (or Loss)*
1946	$562,000.00	$ 1,853.16
1947	80,000.00	(3,000.00)
1950	289,431.00	—0—
1951	524,000.00	811.00
1952	350,000.00	(4,400.00)
1953	—0—	(193.00)
1954	—0—	—0—
1955	—0—	(10,000.00)

This issue was tried before a jury and the jury determined that in 1954 and 1955 the partnership held the lots in the Allendale tract primarily for sale to customers in its ordinary course of trade or business. The jury's verdict in the instant case not only has a rational basis in the evidence, but is firmly grounded in the facts of record.

In 1954 alone the partnership made nine separate sales of lots from the reacquired tract of land.

It has been uniformly held that the question of particular property held primarily for sale to customers in the ordinary course of business is essentially a question of fact to be determined by the trier of fact. *Gamble* v. *Commissioner, supra; Jackson* v. *King*, 223 F.2d 714 (5th Cir. 1955); *Galena Oaks Corp.* v. *Scofield, supra.*

Where a jury has tried a matter upon correct instructions, the only inquiry is whether such conclusion could with reason be reached on the evidence. *Commissioner* v. *Duberstein*, 363 U.S. 278; *United States* v. *Kaiser*, 363 U.S. 299 (1960).

The taxpayers' contention that the property was originally purchased in 1943 as an investment is not persuasive of its subsequent intent and use after reacquisition in the mortgage foreclosure. While property may at one time be held for investment purposes, if the character of the business changes or the intent of the partners changes, the property could subsequently be found by reasonable men to be held primarily for sale to customers in the ordinary course of business.

We think that the verdict of the jury is clearly sustainable upon the evidence and we affirm the District Court's denial of the motion for directed verdict.

AFFIRMED in Part.

REVERSED in Part with Directions.

A true copy

Test: /s/ Edward W. Wadsworth
(Seal) Clerk, U. S. Court of Appeals, Fifth Circuit, New Orleans, Louisiana
July 11, 1962.

JUDGMENT

Extract from the Minutes of April 19, 1962
GEORGE D. PATTERSON, District Director
of Internal Revenue,

No. 18925 versus

W. A. BELCHER, ET AL.

JAMES R. ABERNATHY, JR., and
MARY BELCHER ABERNATHY,

versus

GEORGE D. PATTERSON, District Director
of Internal Revenue.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court on the Director's appeal in this cause be, and the same are hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions for the entry of judgment and for further proceedings in accordance with the opinion of this Court; and that the District Court's denial of the motion of plaintiffs, James R. Abernathy, Jr., and Mary

Belcher Abernathy, for directed verdict be, and it is hereby, affirmed;

It is further ordered and adjudged that the appellees, W. A. Belcher, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT.

No. 18925

GEORGE D. PATTERSON,
District Director of Internal Revenue,
Appellant,

vs.

W. A. BELCHER, ET AL.,
Appellees.

JAMES R. ABERNATHY, JR., and
MARY BELCHER ABERNATHY,
Appellants,

vs.

GEORGE D. PATTERSON,
District Director of Internal Revenue,
Appellee.

Appeals from the United States District Court for the Northern District of Alabama.

(June 29, 1962)

ON PETITION FOR REHEARING

Before RIVES and WISDOM, Circuit Judges, and CARSWELL, District Judge.

PER CURIAM: We have considered carefully all grounds asserted and find no cause for rehearing although

the petition does call attention to certain sentences of the Courts' opinion which require amendment for clarification and correction textually without impairment to its rationale or its holding.

On page 7 of the opinion the Court stated:

> "By agreement of the parties only a few of the many factual issues presented were submitted to the jury, all others being left to the trial court for determination. Since the court found that the sales were not made of property held primarily for sale to customers in the ordinary course of trade or business, the subsequent interrogatories submitted to the jury distinguishing long term gains from short term gaines (sic) necessarily followed. We hold that the issue was properly raised and adjudicated below and is, therefore, properly before this Court."

The language of this paragraph is amended to read as follows:

> "By agreement of the parties only a few of the factual issues presented were submitted to the jury, all others being left to the trial court for determination. Submitted to the jury were interrogatories requiring the jury to determine, for the various years in question, the fair market value of certain timber held for more than six months, and less than six months. The jury made no determination that the taxpayer held the timber primarily for sale to customers in the ordinary course of trade or business. The jury only made such findings relating to the Allendale and Crawford tracts and such findings are not relevant to the particular issue here. The jury was not asked to make such a finding with respect to the other timber. It was either assumed by the parties that the timber was not held primarily for sale to customers in the ordinary course of trade or business, or either or both of the parties completely failed to bring this issue to the Court's attention *at the time that the*

interrogatories were submitted to the jury. In any event, we find that such a determination is indispensable to a final adjudication of this cause. Since the District Court later found that the timber was not held primarily for sale to customers in the ordinary course of trade or business, the findings of the jury with respect to fair market value have efficacy. Had the court found, even after the jury's verdict, that the timber was held primarily for sale to customers in the ordinary course of trade or business irrespective of the jury verdicts the taxpayers would not be entitled to capital gain. What the District Court here did was, in effect, submit the question of damages to the jury prior to determining or having determined itself the question of liability.

"We hold, therefore, that the issue was properly raised in the court below and that the District Court made a finding of a fact on this very point at issue."

Secondly, the paragraph of the Courts' opinion on page 12 reading:

"The second question raised in the Director's appeal is whether the District Court erred in refusing to make a determination of the specific year in which the Allendale tract of land became a taxable event to the partnership."

should read as follows:

"The second question raised in the Director's appeal is whether the District Court erred in refusing to make a determination of the specific year in which the Allendale mortgage foreclosure became a taxable event to the partnership."

The language of the latter paragraph is substituted for the former language of the opinion.

Of the other matters urged in the petition for rehearing we conclude that these are repetitious of the grounds previously submitted, considered and determined. The petition for rehearing is therefore,

DENIED.

ORDER DENYING REHEARING

Extract from the Minutes of June 29, 1962.

GEORGE D. PATTERSON, District Director of Internal Revenue,

No. 18925 versus

W. A. BELCHER, ET Al.

JAMES R. ABERNATHY, JR., and MARY BELCHER ABERNATHY,

versus

GEORGE D. PATTERSON, District Director of Internal Revenue.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby denied.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT.

No. 18925

GEORGE D. PATTERSON, District Director
of Internal Revenue,
Appellant,

versus

W. A. BELCHER, ET AL.
Appellees.

JAMES R. ABERNATHY, JR., and
MARY BELCHER ABERNATHY,
Appellants,

versus

GEORGE D. PATTERSON, District Director
of Internal Revenue,
Appellee.

Appeals from the United States District Court for the Northern District of Alabama.

ORDER STAYING MANDATE

(ORIGINAL FILED—JULY 10, 1962.)

ON CONSIDERATION OF THE APPLICATION of appellees, W. A. Belcher, et al. and appellants, James R. Abernathy, et al., in the above numbered and entitled

cause for a stay of the mandate of this Court therein, to enable them to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of 90 days from June 29, 1962; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within 90 days from June 29, 1962 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of 90 days from June 29, 1962, unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ G. HARROLD CARSWELL,
United States District Judge.

Dated: July 9, 1962.

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No. 439

In the Supreme Court of the United States

OCTOBER TERM, 1962

W. A. BELCHER, NELL VANDERGRIFF BELCHER, JAMES R. ARMSTRONG, JR., AND MARY BELCHER ARMSTRONG, PETITIONERS

v.

GEORGE D. PATTERSON, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	7
Conclusion	13
Appendix	14

CITATIONS

Cases:

Ah Pah Redwood Co. v. *Commissioner*, 251 F. 2d 163 — 8

Ingersoll v. *Mason*, 254 F. 2d 899 — 11

Jantzer v. *Commissioner*, 284 F. 2d 348 — 12

Merrill v. *Beaute Vues Corp.*, 235 F. 2d 893 — 12

Pennroad Corp. v. *Commissioner*, 261 F. 2d 325, certiorari denied *sub nom. Madison Fund, Inc.* v. *Commissioner*, 359 U.S. 958 — 12

Ribeiro v. *United Fruit Co.*, 284 F. 2d 317, certiorari denied, 365 U.S. 872 — 11

Constitution of the United States:

Seventh Amendment — 11

Statutes:

Internal Revenue Code of 1939:

Sec. 117(a) (26 U.S.C. 1952 ed., Sec. 117(a)) — 7, 8, 12, 14, 16

Sec. 117(j) (26 U.S.C. 1952 ed., Sec. 117(j)) — 14, 16

Sec. 117(k) (26 U.S.C. 1952 ed., Sec. 117(k)) — 8, 15, 16

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Statutes—Continued

Internal Revenue Code of 1954:
Sec. 631(a) (26 U.S.C. 1958 ed., Sec. 631(a)) — Page 16
Sec. 631(b) (26 U.S.C. 1958 ed., Sec. 631(b)) — 16
Sec. 1221 (26 U.S.C. 1958 ed., Sec. 1221) — 16
Sec. 1222 (26 U.S.C. 1958 ed., Sec. 1222) — 16
Sec. 1231 (26 U.S.C. 1958 ed., Sec. 1231) — 16
Miscellaneous:
Federal Rules of Civil Procedure, Rule 49 — 11

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 439

W. A. BELCHER, NELL VANDERGRIFT BELCHER, JAMES R. ABERNATHY, JR., AND MARY BELCHER ABERNATHY, PETITIONERS

v.

GEORGE D. PATTERSON, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the district court (Pet. App. 12–21) are not officially reported. The opinion of the court of appeals (Pet. App. 29–46) is reported at 302 F. 2d 289. The opinion denying taxpayers' petition for rehearing and amending the opinion of the court of appeals for clarification is reported at 305 F. 2d 557.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1962. (Pet. App. 47–48.) Taxpayers' petition for rehearing was denied on June 29, 1962.

(Pet. App. 52.) The petition for a writ of certiorari was filed on September 18, 1962. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners waived their right to a jury trial on the question whether timber was held by the partnership primarily for sale to customers in the ordinary course of business.

2. Whether, for the purpose of ascertaining the applicability of the capital gain provisions of the 1939 and 1954 Codes, the court of appeals properly reversed a finding of the trial court that timber was not held by the partnership primarily for sale to customers in the ordinary course of its business on the ground that it was contrary to undisputed evidentiary facts.

STATUTES INVOLVED

The pertinent provisions of Section 117 of the Internal Revenue Code of 1939 and Sections 631, 1221, 1222, and 1231 of the Internal Revenue Code of 1954 appear in the Appendix, *infra*, pp. 15–18.

STATEMENT

This case involves adjustments to the income of the Belcher Land and Timber Company, a partnership, resulting in increased tax liabilities of the individual partners, who are the petitioning taxpayers. The Belcher Land and Timber Company was formed on August 1, 1946, and the W. A. Belcher Lumber Com-

pany, Inc. (hereafter referred to as the corporation), commenced operations on the same date. The members of the partnership also own the stock of the corporation in proportion to their respective interests in the partnership. W. A. Belcher has been the chief executive officer of both the partnership and the corporation since their inception. (Pet. App. 30.)

In the years 1950 through 1955 the partnership bought and sold real estate and standing timber.[1] Pursuant to a loose oral arrangement in the nature of a continuing offer by the partnership for the sale of its timber, the corporation purchased and cut standing timber from the land owned or leased by the partnership and manufactured it into lumber. The payment received by the partnership from the corporation was measured by the fair market value of the timber cut.[2]

[1] The purchases of timber by the partnership in the years 1950 through 1955 were as follows (Pet. App. 30-31):

	Number of Purchases	Footage (Board Feet)
1950	16	5,838,194
1951	25	10,555,242
1952	49	4,779,809
1953	59	8,805,923
1954	49	20,311,667
1955	42	16,344,598

[2] The partnership sales to the corporation for the years 1950 through 1955 were as follows (Pet. App. 31):

	Price Paid by Corporation	Footage (Million Board Feet)
1950	$839,432.27	15.4
1951	522,805.53	15.1
1952	495,257.08	14.4
1953	419,419.30	16.1
1954	352,078.20	12.2
1955	512,222.71	16.5

In addition to the sales made to the corporation, the partnership also sold timber to other customers.[3] (Pet. App. 30–32.)

In its tax returns for the years 1950 through 1955 the partnership treated the profits derived from the sales of timber as long-term capital gain. The individual members of the partnership treated their respective distributive shares of these profits in that same manner in their individual tax returns (Pet. App. 32).

After audit of the partnership returns, the Internal Revenue Service found deficiencies in taxes for each of the partners for all of the years 1950 through 1955, inclusive. The year 1953 is the subject matter of pending litigation in the Tax Court and is not involved in this case. The partners paid the assessed deficiencies and, after denial of their claims for refund, commenced actions for refund in the district court. (Pet. App. 32.)

Prior to the trial the respondent Director filed a motion for set-off, urging that neither the partnership nor the individual partners were entitled to capital

[3] The partnership sales to other customers for the years 1950 through 1955 were as follows (Pet. App. 32):

	Timber Held by Partnership for More than 6 Mos.	Timber Held by Partnership for Less than 6 Mos.
1950	$2,148.45	0
1951	2,196.69	0
1952	3,552.32	0
1953	0	0
1954	0	$7,735.00
1955	13,680.00	2,739.05
Total	21,577.46	10,474.05

gain treatment on the partnership sales of timber because, among other reasons, the partnership was engaged in the business of selling logs and timber to customers in the ordinary course of its business. (R. 166–167; Pet. App. 32–33.)

By agreement of the parties only a few of the factual issues presented were submitted to the jury, all others being left to the trial court for determination. (R. 530, 541, 579–580.) The jury was required to answer interrogatories as to the fair market value of timber held for more than six months, and also of timber held for six months or less. Moreover, at the request of the Director, the court gave the jury the following instruction (Pet. App. 34; R. 534, 553):

> You will notice from the questions I am going to hand to you to take into the jury room that you are asked to determine the fair market value of timber held for six months or less and for timber held for more than six months. This separation is important because the tax treatment is different. Timber held for more than six months is subject to the capital gains tax while timber held for six months or less before the cutting date is subject to ordinary income tax rates. Therefore your answers will separate the two for each of the years in question. This means that you must first determine which timber was held for more than six months before cutting and which was held for six months or less. After separating the two, you must determine the fair market value of each upon the cutting date.

The jury was not asked to determine, and did not determine, whether the partnership held the timber

primarily for sale to customers in the ordinary course of trade or business. (Pet. App. 13–16, 50.)[4]

In its findings of fact the district court specifically found that the sales of timber for each of the years 1950 through 1955 by the partnership to the corporation were *not* of property held primarily for sale to customers in the ordinary course of the trade or business of the partnership. In its conclusions of law the court held that the gain from sales of timber made by the partnership to the corporation during each of the five years involved here were entitled to capital gain treatment under the Internal Revenue Code. (Pet. App. 18, 21, 34.)

The court of appeals, on the basis of the undisputed evidentiary facts of record, held that the district court "erred in its ultimate determination that the sale of timber for the years in question [was] not of property held primarily for sale to customers in the ordinary course of trade or business" and, consequently, that the sales of timber did not constitute sales of "capital assets" under Section 117(a) of the 1939 Code. Accordingly, it vacated the judgment of the district court and remanded the case for entry of judgment in accordance with its opinion. (Pet. App. 39.)[5]

---

[4] The jury was asked to make, and did make, findings with respect to whether particular property known as the Allendale tract of land and that portion of the Crawford tract of land from which the Payne sales were made were held primarily for sale to customers in the ordinary course of trade or business of the partnership during various years in issue, but such findings are not relevant to the issue here. (Pet. App. 15–16, 50.)

[5] The Court of Appeals also sustained the Director's position with respect to other questions concerning income derived from

ARGUMENT

The decision of the court of appeals that the taxpayers' partnership held timber primarily for sale to customers in the ordinary course of its trade or business, and therefore that income from such sales should not be taxed at capital gain rates, rests upon the particular facts of this case, and is clearly correct. Contrary to the taxpayers' assertion, the proceedings below do not involve any infringement of constitutional rights. There are no conflicting decisions. Thus, there is no need for further review by this Court.

1. Taxpayers' contentions that the court of appeals deprived them of rights under the Seventh Amendment of the Constitution are without merit. This case does not involve any reversal of a jury verdict by an appellate court nor any denial of a requested jury trial.

(a) Taxpayers' initial contention (Pet. 24–36) is that the court of appeals improperly reversed a jury verdict as to whether taxpayers' income from partnership timber sales is entitled to capital gains treatment under Section 117 of the Internal Revenue Code of 1939, Appendix, *infra*, pp. 15–17.[2] However, the

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the Allendale tract of land (reversing the district court on one issue and affirming on another issue). (Pet. App. 40–46.) In their petition for certiorari, taxpayers have not sought further review with respect to these issues.

[2] The years 1954 and 1955 are governed by the 1954 Code. However, since the applicable provisions of the 1954 Code (Appendix, *infra*, pp. 17–18) are in most respects the same as their counterparts in the 1939 Code, statutory references herein will for the sake of simplicity be made to the 1939 Code only.

record clearly establishes that, by agreement of the parties, the "sale to customers" issue was not submitted to the jury, but rather was reserved to the court, which decided the issue in taxpayers' favor. (R. 580–582.)[7] Taxpayers concede (Pet. 26–27) that for income from timber sales to qualify for long-term capital gain treatment[8] under Section 117(a), it must be shown not only that the timber was held for more than six months, but also that such "timber was not held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." *Ah Pah Redwood Co.* v. *Commissioner*, 251 F. 2d 163, 168 (C.A. 9th). They assert, however, that in the present case only the holding period was in issue because the pleadings did not frame the question whether the timber was held for sale to customers, and also because, at the request of the Director, the jury was instructed that "[t]imber held for more than six months is subject to the capital gains tax while timber held for six months or less before the cutting date is subject to ordinary income tax rates." (Pet. 3.) It

[7] As the court of appeals pointed out (Pet. App. 50), the parties agreed that only specified issues should be submitted to the jury. All other issues were reserved for decision by the trial court.

[8] Gains from the sales of timber constitute capital gains and are given favored capital gains treatment only if (1) the timber is a "capital asset" as defined by Section 117(a) (1) and (4) of the 1939 Code, Appendix, *infra*, p. 15, or (2) the transactions by which the gain is realized coniply with the specific terms of Sections 117(k) (1) or (2) of the 1939 Code, Appendix, *infra*, pp. 16–17. The taxpayers did not assert any rights with respect to the latter sections in the court of appeals and that court accordingly found it unnecessary to discuss them. (Pet. App. 37.)

follows, they say, that the Director must be deemed to have conceded that the timber was not held by the partnership for sale to customers in the ordinary course of its business, and that the jury verdict establishes the amount of taxpayers' capital gain.

In fact, however, the Director made no such concession. In both the trial and appellate proceedings below the Director maintained that the taxpayers are not entitled to capital gains treatment because the specific statutory requirements are not satisfied. Without objection by the taxpayers' counsel, the "sale to customers" issue entered the case on the Director's pre-trial motion for set-off, which asserted, among other things, that during the years 1950–1955, inclusive, the partnership was engaged in the business of selling logs and timber to customers in the ordinary course of its trade or business. (Pet. App. 32–33; R. 167, Par. II.) The record is replete with evidence that the partnership conducted a substantial and active timber selling business. (See Pet. App. 37–39.) And, the district court specifically and unequivocally dealt with this question as one of "those issues tried to the court without a jury" (R. 580). It found that the partnership's sales of timber to the corporation for each of the years 1950–1955 "were not made of property held primarily for sale to customers in the ordinary course of trade or business" (R. 581–582), and concluded that such sales of timber, held for more than six months, "are entitled to capital gain treatment under the appropriate provisions of the Internal Revenue Code of 1939 or 1954, as the case may be." (R. 584.)

Moreover, the Director's request for instructions (Pet. App. 34) on the holding-period issue does not indicate abandonment of the issue under discussion. The Director had offered testimony and exhibits as to the length of time the partnership had held the timber in order to protect the government's interests in the event of a subsequent ruling by the trial court, contrary to the facts, that the partnership did not hold the timber primarily for sale to customers in the ordinary course of its trade or business. Further, since the jury was to determine the fair market value of timber sold by the partnership which had been held for more than six months and the fair market value of such timber which had been held for six months or less, the Director considered it desirable to instruct it as to why it was being asked to separate long-term sales from short-term sales. Thus, in requesting these instructions the Director was merely protecting the record against a possible adverse ruling by the court on a disputed question and in no way abandoned his position with respect to whether the timber was held for sale to customers in the ordinary course of business and therefore was not a capital asset at all.

The agreement between the parties that only specified issues were to be submitted to the jury, was repeatedly referred to by the district court (R. 530, 541, 579–580). Accordingly, without submitting the question to the jury, the court determined in taxpayers' favor that the timber sold by the partnership was not held by it primarily for sale to customers in the ordinary course of its trade or business (R. 581–582). The

jury did not even consider, much less enter a verdict on, that question. Thus, the instant case could not involve any reversal of a jury verdict by an appellate court, and the taxpayers' contention under the Seventh Amendment is without factual foundation.

(b) The above facts also refute taxpayers' alternative contention (Pet. 36–42) that, in violation of the Seventh Amendment, they were denied the right to jury trial on the question whether the partnership's timber sales were of property held by it primarily for sale to customers in the ordinary course of its trade or business. As we have noted, the taxpayers agreed that all issues not specifically submitted to the jury would be decided by the trial court. The Director's motion for set-off plainly introduced the "sale to customers" issue into the case. The court recognized it as one of the "issues tried to the court without a jury" (R. 580) and resolved it in favor of the taxpayers (R. 582) despite overwhelming contrary evidence. Under the circumstances it is entirely clear that petitioners waived their right to a jury determination of this issue. See Federal Rules of Civil Procedure, Rule 49(a);[9] *Ribeiro* v. *United Fruit Co.*, 284 F. 2d 317, 319 (C.A. 2d), certiorari denied, 365 U.S. 872; *Ingersoll* v. *Mason*, 254 F. 2d 899, 903 (C.A.

[9] Rule 49(a) provides that "If * * * [in instructing the jury with respect to special written questions] the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

8th); *Merrill v. Beauté Vues Corp.*, 235 F. 2d 893, 896–897 (C.A. 10th).

2. Finally, taxpayers maintain (Pet. 42–46) that the timber sales in question here were all made to a single vendee (the sales by the partnership to the corporation); that under such circumstances, conflicting inferences can be drawn as to whether these are sales to customers; and, consequently, that the court of appeals was without authority to reverse the district court's finding of fact. This contention, however, rests on an erroneous factual premise. The corporation was not the only vendee to which the partnership sold timber. In every year involved in this case (1950–1952, 1954, 1955), the partnership also sold to other customers, receiving from those sales total income in the amount of $32,051.51. (Pet. App. 32, 38; R. Pltf. Ex. 34.) The fact that the partnership sold *most* of its timber to the corporation does not detract from the fact that it was in the business of selling timber to customers within the meaning of Section 117(a)(1). Nor is there anything in the statute to suggest that sales to a somewhat restricted group of purchasers are not to be considered sales to customers. *Pennroad Corp.* v. *Commissioner*, 261 F. 2d 325 (C.A. 3d), certiorari denied *sub nom. Madison Fund, Inc.* v. *Commissioner*, 359 U.S. 958. Indeed, a single vendee may be a customer for purposes of Section 117(a)(1). *Jantzer* v. *Commissioner*, 284 F. 2d 348 (C.A. 9th).

In the present case the evidence of record overwhelmingly establishes that the partnership was primarily in the business of selling timber to customers.

W. A. Belcher, chief executive officer of both the partnership and the corporation, categorically so stated. (Pet. App. 37–38; R. 271–272.) And the business records of the partnership show huge purchases of standing timber and sales of timber on a regular basis throughout the period in issue. (Pet. App. 31–32, 38–39.) On the basis of such undisputed facts, the court of appeals concluded that "if the sales of timber made by the partnership did not consist of timber held primarily for sale to customers in the ordinary course of trade or business, it is difficult to conceive for what other purpose the timber was held." (Pet. App. 39.) Certainly taxpayers have shown no other purpose. Accordingly, the court of appeals was clearly correct in reversing the district court's erroneous decision.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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NOVEMBER 1962.

APPENDIX

Internal Revenue Code of 1939:

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

(1) [As amended by Section 210(a), Revenue Act of 1950, c. 994, 64 Stat. 906] *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(A) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

* * * * *

(4) [As amended by Sec. 150(a)(1), Revenue Act of 1942, c. 619, 56 Stat. 798 and Sec. 322(c)(2), Revenue Act of 1951, c. 521, 65 Stat. 452] *Long-term capital gain.*—The term "long-term capital gain" means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing gross income;

* * * * *

(j) [As added by Sec. 151(b) of the Revenue Act of 1942, *supra,* and amended by Sec. 127(b) of the Revenue Act of 1943, c. 63, 58 Stat. 21] *Gains and Losses from Involuntary Conversion and From the Sale or Exchange of*

Certain Property Used in the Trade or Business.—

(1) *Definition of property used in the trade or business.*—For the purposes of this subsection, the term "property used in the trade or business" * * * includes timber with respect to which subsection (k)(1) or (2) is applicable * * *.

(2) *General rule.*—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. * * *

* * * * * * *

(k) [As added by Sec. 127(a), Revenue Act of 1943, *supra*, and as amended by Sec. 325(b) and (c), Revenue Act of 1951, *supra*] *Gain or loss in the Case of Timber or Coal.*—

(1) If the taxpayer so elects upon his return for a taxable year, the cutting of timber (for sale or for use in the taxpayer's trade or business) during such year by the taxpayer who owns, or has a contract right to cut, such timber (providing he has owned such timber or has held such contract right for a period of more than six months prior to the beginning of such year) shall be considered as a sale or exchange of such timber cut during such year. * * *

(2) In the case of the disposal of timber or coal (including lignite), held for more than 6 months prior to such disposal, by the owner thereof under any form or type of contract by virtue of which the owner retains an economic interest in such timber or coal, the difference between the amount received for such timber or coal and the adjusted depletion basis thereof shall be considered as though it were a gain or loss, as the case may be, upon the sale of such timber or coal. * * *
(26 U.S.C. 1952 ed., Sec. 117.)

Sections 1221(1), 1222(3), and 1231 (a) and (b)(2) (26 U.S.C. 1958 ed., Secs. 1221, 1222, and 1231) are the corresponding provisions in the 1954 Code to the provisions of Section 117 (a) and (j) of the 1939 Code set forth above and are in all pertinent respects the same. Section 631 is the corresponding provision in the 1954 Code to Section 117(k) of the 1939 Code and is set forth below.

Internal Revenue Code of 1954:

SEC. 631. GAIN OR LOSS IN THE CASE OF TIMBER OR COAL.

(a) *Election to Consider Cutting As Sale or Exchange.*—If the taxpayer so elects on his return for a taxable year, the cutting of timber (for sale or for use in the taxpayer's trade or business) during such year by the taxpayer who owns, or has a contract right to cut, such timber (providing he has owned such timber or has held such contract right for a period of more than 6 months before the beginning of such year) shall be considered as a sale or exchange of such timber cut during such year. * * *

(b) *Disposal of Timber With a Retained Economic Interest.*—In the case of the disposal of timber held for more than 6 months before such disposal, by the owner thereof under any

form or type of contract by virtue of which such owner retains an economic interest in such timber, the difference between the amount realized from the disposal of such timber and the adjusted depletion basis thereof, shall be considered as though it were a gain or loss, as the case may be, on the sale of such timber. * * * For purposes of this subsection, the term "owner" means any person who owns an interest in such timber, including a sublessor and a holder of a contract to cut timber.

* * * * * *

(26 U.S.C. 1958 ed., Sec. 631.)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 439

W. A. BELCHER, NELL VANDERGRIFT BELCHER, JAMES R. ABERNATHY, JR., AND MARY BELCHER ABERNATHY,
Petitioners

vs.

GEORGE D. PATTERSON, DISTRICT DIRECTOR OF INTERNAL REVENUE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

Argument 1

Conclusion 8

Certificate 9

TABLE OF CASES

Atlantic and Gulf Stevedore v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 82 S. Ct. 780, 7 L. Ed. 798 6

Gianfala v. *Texas Company*, 350 U.S. 879, 76 S. Ct. 141, 100 L. Ed. 775 8

CONSTITUTIONAL PROVISIONS AND STATUTES

Seventh Amendment, Constitution of the United States 2, 6

Internal Revenue Code of 1939—

Sec. 117 (26 U.S.C.A., 1952 Ed., Sec. 117) 3, 4, 7, 8

Internal Revenue Code of 1954—

Sec. 1221 (26 U.S.C.A., Sec. 1221) 3, 7, 8

Sec. 631 (26 U.S.C.A., Sec. 631) 3, 4

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ARGUMENT

Petitioners file this reply brief to the brief for the respondent in opposition and, for convenience, the points will be designated in the same numerical order as they appear in the argument in respondent's brief.

1. In neither the first nor the extended opinion of the Court of Appeals was there a reference to any waiver by petitioners of their right to a jury trial under the Seventh Amendment of the Constitution of the United States. It is surprising, therefore, that instead of defending the judgment of the Court of Appeals on the grounds stated in the extended opinion of that Court, untenable as they are, respondent District Director now contends that petitioners "waived" their right to trial by jury under the Seventh Amendment of the question of whether timber sold to the corporation by the partnership was held by the partnership primarily for sale to customers in the ordinary course of the trade of business of the partnership. With respect to this particular question, the Court of Appeals stated in its extended opinion:

> "* * * It was either *assumed by the parties that the timber was not held primarily for sale to customers in the ordinary course of trade or business, or either or both parties completely failed to bring this issue to the Court's attention at the time the interrogatories were submitted to the jury.* * *" (Emphasis supplied)

Extended Opinion, Court of Appeals, Appendix, pp. 50, 51.

Petitioners, of course, were incapable of waiving the jury determination of an issue which was not known by either party or by the Court to exist as a contested issue at the time the case was submitted to the jury. The "issue" was not in fact in controversy and it was not tried as a controversial issue in the District Court because it was not made an issue by the pleadings, pre-trial order or evidence.

Pointedly ignoring the answer of the respondent affirmatively defending the determination of the Commis-

sioner that petitioners were entitled to long term capital gain treatment on timber sales, respondent District Director, argues that "the 'sale to customers' issue entered the case on the Director's pre-trial motion for set-off" and that is the sole reliance of respondent in contending that the issue was in the case. (Resp. Brief p. 9) The motion for set-off was filed the day before the commencement of the jury trial, and the complete motion is set forth in the Petition for Certiorari, page 13 *et seq.*, as it appears in the record page 165 *et seq.* The motion is explicitly limited by its terms to the application of Sections 117(k) (2) of the Internal Revenue Code of 1939 or Section 631(b) of the Internal Revenue Code of 1954 to the timber sales. These particular sections are cited by numbe in the motion and each allegation of the motion denying the applicability of the sections refers to "said sections", thereby demonstrating the unmistakable intention of confining the motion to the applicability of the sections cited.

Contrary to respondent's contention, the statement in the motion that the partnership "was engaged, among other things, in the business of selling logs and timber to customers in the ordinary course of its trade or business" does not, directly or indirectly, invoke the question of applicability of Section 117(a) of the 1939 Code or Section 1221(1) of the 1954 Code, and there was neither any allegation in the motion nor later contention in the trial of the case in the District Court that it does so. Had such been the intent, then of necessity the motion would have included the specific statement that the particular timber sold by the partnership to the corporation constituted "property held by the taxpayer primarily for sale to customers in the ordinary course of the trade or business of the partnership". The absence of any such language conclusively manifests the intent of confining the motion to the appli-

cability of Sections 117(k) (2) of the 1939 Code or Section 631(b) of the 1954 code to which it is limited.

Moreover, the foregoing excerpt from the extended opinion of the Court of Appeals recognizes that neither the Court nor the parties considered that the question of "sales to customers" with respect to timber was a controverted issue when the case was submitted to the jury. Both parties, without deviation, proceeded on the theory in trying the case that the holding period of the timber sold by the partnership to the corporation was completely and finally determinative of whether such timber was entitled to capital gain treatment in accordance with the pertinent special interrogatories stipulated in the pre-trial order. Nothing could be a clearer statement of the theory upon which the case was tried by both parties than the Court's instruction to the jury given at the request of the respondent Director that:

> "*Timber held for more than six months is subject to the capital gains tax while timber held for six months or less before the cutting date is subject to ordinary income tax rates.*" (Emphasis supplied) (R. 552, 553)

Respondent District Director further argues that the entry of findings of fact and conclusions of law by the District Court as to the capital gains treatment of timber sales is a persuasive indication that the "sales to customers" question survived the jury verdict as a controversial issue. That argument is founded on the fallacious assumption that each finding was made by the Court in connection with a controversial issue at the time the finding was made. That assumption is not so. For example, in the first finding of fact, the District Court found that:

> "1. Belcher Land and Timber Company is a partnership created on August 1, 1946 and at all times

subsequent th[illegible] has been *a valid and subsisting partnership.* * * *" (Emphasis supplied) (Appendix, p. 16)

In early Revenue Agent reports applicable to the years in litigation, the validity of the partnership had been challenged by the Revenue Agents conducting the investigation. However, prior to the commencement of this litigation, this issue had been resolved favorably to the petitioners and accordingly, it was not in controversy when the case was tried. The finding of fact by the Court adverting to the uncontested validity of the partnership did not resurrect that issue as a controversial one.

By the same token, the findings of fact and conclusions of law made by the Court as to the capital gain treatment of timber did not revive that issue as a controversial one, inasmuch as it had been theretofore adjudicated by the jury verdict upon special interrogatories under the issues formulated in the pre-trial order pursuant to the law of the case as contained in the Court's instruction to the jury. It was the jury verdict pursuant to Defendant's Requested Instruction No. 4 which finally adjudicated the amount of timber entitled to capital gain treatment. Conclusion of law No. 4 reads as follows:

> "4. The sales of timber made by the Belcher Land and Timber Company, a partnership to the W. A. Belcher Lumber Company, a corporation, during the years 1950, 1951, 1952, 1954, and 1955, *of timber held for more than six months are entitled to capital gain treatment under the appropriate provisions of the Internal Revenue Code of 1939 or 1954, as the case may be*". (Emphasis supplied) (Appendix, p. 21)

This statement of the law is the same as that given by the Court at the request of the respondent to the jury reading in part as follows:

DEFENDANT'S REQUESTED INSTRUCTION No. 4
"* * * You will notice from the questions I am going to hand you to take into the jury room that you are asked to determine the fair market value of timber held for six months or less and for timber held for more than six months. This separation is important because the tax treatment is different. *Timber held for more than six months is subject to capital gains tax while timber held for six months or less before the cutting date is subject to ordinary income tax rates.* * * *" (Emphasis supplied) (R. 552, 553)

The respondent could not request Defendant's Requested Instruction No. 4 as the law of the case stating that the holding period was the sole criterion for determining capital gains without, of necessity, conceding that the timber was not held primarily for sale to customers in the ordinary course of the trade or business of the partnership. Consequently, the finding of fact of the Court to the effect that the sales of timber made by the partnership to the corporation "were not made of property held primarily for sale to customers in the ordinary course of the trade or business of Belcher Land and Timber Company a partnership" merely indicates affirmative agreement by the Court of the uncontested and conceded premise which was the basis of Defendant's Requested Instruction No. 4 resulting in the holding period as being the only controversial issue to be decided in determining the capital gain treatment of timber. The jury verdict, therefore, finding the amount of timber sold by the partnership to the corporation held over six months thereby established the amount of capital gains to which petitioners were entitled on timber sales and the reversal of the judgment based on that verdict violates petitioners' constitutional right to a jury trial under the Seventh Amendment. *Atlantic & Gulf Stevedores* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 82 S. Ct. 780, 7 L. Ed. 798.

2. Respondent's brief contains a misleading statement reading as follows:

> "In the present case the evidence of record overwhelmingly establishes that the partnership was primarily in the business of selling timber to customers. W. A. Belcher, chief executive officer of both the partnership and the corporation, categorically so stated (Pet. App. 37-38; R. 271, 272)." Resp. Brief, pgs. 12, 13

In the quotation referred to, Mr. Belcher did not categorically state that the partnership was engaged in selling timber to "customers". Mr. Belcher stated that the partnership sold timber to the *single vendee, the corporation,* and he did not state that the partnership was in that business. (Appendix, pgs. 37, 38; R. 271-272)

Respondent also argues with respect to the assertion of petitioners that the sales of timber from the partnership to the corporation were to a single vendee as follows:

> "This contention, however, rests on an erroneous factual premise. The corporation was not the only vendee to which the partnership sold timber." Resp. Brief, p. 12

While it is true that the partnership during the years in question sold a minuscule fraction of timber to others than the corporation, such "other sales" were not involved in this case. The only timber sales involved in the refund suits in the District Court were those from the partnership to the corporation—a single vendee—and so the question for determination by the trier of fact was whether the partnership was entitled to capital gain treatment under Section 117 (a) of the 1939 Code or Section 1221 (1) of the 1954 Code on timber sales to a single vendee.

The earnest endeavor of respondent Director to create the impression of multiple vendees or customers is under-

standable because the statute refers to "customers" in the plural. Nevertheless, the fact is that only one vendee is involved in the timber sales in this case under the Commissioner's determination that sales to such single vendee were entitled to long term capital gain treatment where the timber sold was held over six months. Our position remains that conflicting inferences may be drawn from the undisputed fact that only one vendee is involved and hence it is a matter for the determination of the trier of fact and not an appellate court as to whether such sales are entitled to capital gain treatment under Section 117 (a) of the 1939 Code or Section 1221 (1) of the 1954 Code. *Gianfala* v. *Texas Company*, 350 U.S. 879, 76 S. Ct. 141, 100 L. Ed. 775.

CONCLUSION

We respectfully submit that the Petition for Writ of Certiorari should be granted, the judgment of the Court of Appeals summarily reversed and the judgment of the District Court reinstated.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing reply brief have been mailed in a United States post office or mail box with first class postage prepaid addressed to the Honorable Archibald Cox, Solicitor General, Department of Justice, Washington 25, D. C., this _____ day of November, 1962.

ERLE PETTUS, JR.
As Counsel for Petitioners